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IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~9003~~ 70-31

PORT OF PORTLAND, et al.,

Appellants,

VS.

UNITED STATES OF AMERICA, et al.,

Appellees.

On Appeal from The United States District
Court for The District of Oregon

Jurisdictional Statement

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Jurisdictional Statement

Appellants. The Port of Portland, Sam R. Haley, Public Utility Commissioner of Oregon, Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Southern Pacific Transportation Company appeal from the Judgment of the United States District Court for the District of Oregon entered July 9, 1970, dismissing the complaint by which appellants challenged an order of the Interstate Commerce Commission. Appellants submit this Statement to demonstrate that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The Order and Judgment of the District Court for the District of Oregon is as yet unreported, and is reproduced as Appendix A hereto. The Report and Order of the Interstate Commerce Commission decided June 6, 1969, and reported at 334 I.C.C. 419, is reproduced as Appendix B. The Order of the Interstate Commerce Commission denying reconsideration and other relief dated October 24, 1969, which is unreported, is reproduced as Appendix C. The Order of the Interstate Commerce Commission denying that an issue of general transportation importance is involved in this proceeding dated November 21, 1969, is reproduced as Appendix D. The Recommended Report and Order of the Interstate Commerce Commission-Examiner served September 24, 1968, which is unreported, is reproduced as Appendix E.

JURISDICTION

This suit was brought under 28 U.S.C. §§ 1336, 2284 and 2321-25 to set aside an order of the Interstate Commerce Commission. The final judgment of the Three Judge District Court was entered on July 9, 1970 (Appendix A), and Notice of Appeal was filed with that Court on September 1, 1970. A copy of said Notice of Appeal is attached hereto marked Appendix F. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States v. Drum*, 368 U.S. 370 (1962); *Dixie Carriers, Inc. v. United States*, 351 U.S. 56 (1956); *United States v. Capital Transit Co.*, 325 U.S. 357 (1945).

QUESTIONS PRESENTED

The Interstate Commerce Commission Order in issue grants the application of Spokane, Portland and Seattle Railway Company and Union Pacific Railroad Company to acquire control of Peninsula Terminal Company pursuant to the provisions of § 5(2) of the Interstate Commerce Act (49 U.S.C., § 5(2)), without providing that appellants Southern Pacific Transportation Company and Chicago, Milwaukee, St. Paul and Pacific Railroad Company be equal owners of and have access to the lines of Peninsula Terminal. Appellants contend that such an order is erroneous as a matter of law and urge that this Court consider the following substantial questions:

(1) Whether the Commission applied erroneous legal tests in reaching a determination of public interest.

(2) Whether the Commission erred in finding that service of Union Pacific Railroad Company and Spokane, Portland and Seattle Railway Company to and from Peninsula Terminal was adequate and sufficient.

(3) Whether the Commission's rejection of common use applications under § 3(5) (49 U.S.C., § 3(5)) of the Interstate Commerce Act was erroneous as a matter of law.

(4) Whether the Commission has sanctioned a violation of the antitrust laws by permitting Spokane, Portland and Seattle Railway Company and Union Pacific Railroad Company to acquire and control Peninsula Terminal without conditioning said approval upon appellants Southern Pacific Transportation Company and Chicago, Milwaukee, St. Paul and Pacific Railroad Company being equal owners of, with access to the lines of Peninsula Terminal.

STATUTES INVOLVED

Sections 5(2)(a), 5(2)(b), 5(2)(c), 5(2)(d), 5(11) and 3(5)* of the Interstate Commerce Act, and the National

*49 U.S.C., §§ 5(2)(a), 5(2)(b), 5(2)(c), 5(2)(d), 5(11) and 3(5).

Transportation Policy set forth in the Preamble to the Interstate Commerce Act. Said statutes are set forth in their entirety in Appendix G.

STATEMENT

By Application filed July 25, 1967, with the Interstate Commerce Commission and assigned Finance Docket No. 24679, Spokane, Portland and Seattle Railway Company and Union Pacific Railroad Company (hereinafter sometimes referred to as "SP&S", "Union Pacific" or jointly as "applicants") sought authority from the Commission pursuant to § 5(2) of the Interstate Commerce Act (49 U.S.C., § 5(2)) to acquire control of Peninsula Terminal Company (hereinafter sometimes referred to as "Peninsula") through acquisition of ownership of all of the issued and outstanding capital stock of that company. Peninsula is a small independent terminal switching carrier approximately 3.79 miles in length located near North Portland, Oregon. In this application it was stated that the western terminus of the tracks of Peninsula reached the northeasterly portion of the Rivergate industrial area in North Portland and that the proposed acquisition of Peninsula would enable applicants to provide rail service to this industrial area over lines of Peninsula. Rivergate industrial area is a 3,000-acre development on reclaimed land undertaken by the Port of Portland at the confluence of the Columbia and Willamette Rivers.

Thereafter, Southern Pacific Transportation Company (formerly Southern Pacific Company, hereinafter sometimes referred to as "Southern Pacific" or "SP") and Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter sometimes referred to as "Milwaukee") by petition sought inclusion as equal owners in the transaction

pursuant to § 5(2)(d), of the Interstate Commerce Act (49 U.S.C. § 5(2)(d)). Milwaukee's Petition for Inclusion was contingent upon approval and consummation of the unification of SP&S with its parent lines and the latter's other subsidiaries in the Northern Lines merger, subject to certain conditions including Condition 24 requiring the merged company to grant to Milwaukee trackage rights for the extension of its freight operations between Longview Junction, Washington and the City of Portland and connecting carriers at Portland, including use of terminal trackage and facilities at Portland, owned by SP&S and its parent, Northern Pacific Railway Company. (See *Great Northern Pac. & B. Lines, Inc., Merger-Great Northern Ry.*, 328 I.C.C. 460 (1966); 331 I.C.C. 228, 357 (1963); *United States v. United States*, 296 F.Supp. 853 (1969); *United States v. I.C.C.*, 396 U.S. 491, 24 L.Ed.2d 700, 90 S.Ct. 708 (1970). Southern Pacific and Milwaukee each requested that as a condition to ownership of Peninsula applicants be required to variously grant use of certain terminal trackage at Portland so that Southern Pacific and Milwaukee could each operate directly to and from the trackage of Peninsula. Milwaukee filed a supplement to its petition for inclusion also requesting common use of said trackage as terminal trackage under § 3(5) of the Interstate Commerce Act (49 U.S.C., § 3(5)) and Southern Pacific filed two separate applications pursuant to said section, which were assigned Finance Dockets Nos. 24890 and 24891. These latter applications sought authority requiring the common use of terminal facilities of Peninsula and use of Union Pacific main line tracks from the Southern Pacific-Union Pacific track connection at East Portland, Oregon, to the tracks of Peninsula at North Portland, and in the alternative, an order requiring the common use of the terminal facilities of Union Pacific

between Peninsula and the Southern Pacific-Union Pacific connection at East Portland, Oregon.

Finance Dockets Nos. 24679, 24890 and 24891 were consolidated for hearing on a common record. Hearings were held in Portland, Oregon, from February 26 through March 1, 1968. Appellants The Port of Portland (a public agency created in 1891 by the State of Oregon) and Sam R. Haley, Public Utility Commissioner of Oregon, intervened before the Commission and offered extensive evidence to protect the public interest in providing Rivergate Industrial District, an area immediately adjacent to Peninsula, with adequate and economic rail service by the four line-haul railroads serving Portland (SP&S, Union Pacific, Southern Pacific and Milwaukee*).

The hearing examiner recommended the granting of the application of applicants for the proposed purchase and control of Peninsula on condition that Southern Pacific be included as a one-third owner with the further provision that upon consummation of the Great Northern-Northern Pacific merger the Milwaukee would be permitted to be a co-owner at that time. The examiner also conditioned the acquisition of Peninsula upon the providing of trackage rights for Southern Pacific and Milwaukee to reach Peninsula.

Exceptions were filed to said Proposed Report and Order by SP&S and Union Pacific and by Order dated June 6, 1969, the Commission (Division 3) reversed the Proposed Report and Order of the hearing examiner and granted the relief requested by applicants without conditions. Thereafter, a petition for reconsideration and request for oral argument was timely filed including a request by Crown Zellerbach

*Milwaukee does not yet reach Portland but has the right to do so pursuant to conditions prescribed by the Commission and approved by this Court in *Northern Lines Merger Cases*, 396 U.S. 491, 514-16, 24 L.Ed.2d 700, 90 S.Ct. 708, 719-20 (1970).

Corporation for further hearing to introduce new evidence; however, by order dated October 24, 1969, Division 3 of the Interstate Commerce Commission issued a report and order which denied reconsideration and refused further hearing. Thereafter, petitions seeking a finding that an issue of general transportation importance was involved were filed. Said petitions were denied on November 26, 1969.

THE QUESTIONS ARE SUBSTANTIAL

The Commission in reversing the hearing examiner and authorizing control of Peninsula by applicants without conditioning said control upon equal ownership by appellants Southern Pacific and Milwaukee with access to Peninsula, has committed reversible error. If permitted to stand unchallenged, it will have an important effect upon the administration of the Interstate Commerce Act and the result will be in direct conflict with the goal of Congress as set forth in the National Transportation Policy (49 U.S.C., preceding § 1), and the interest of the public will not be served.

1. The Commission applied erroneous legal tests in determining public interest.

Section 5(2)(c) of the Act (49 U.S.C., § 5(2)(c)) sets forth criteria to be considered by the Commission in passing on acquisitions of control by one carrier of another or by two or more carriers of another. The criteria include "the effect of the proposed transaction upon adequate transportation service to the public" and "the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction". Under § 5(2)(d) (49 U.S.C., § 5(2)(d)), the Commission is authorized to require inclusion of other railroads upon equitable terms and upon a finding that the inclusion is consistent with the public interest.

Furthermore, the Commission has not only the power, but *the duty*, to impose conditions which satisfy the public interest. In *Atlantic C. L. R.R. v. United States*, 48 F.2d 239, 244 (1931), *aff'd*, 284 U.S. 288, 76 L.Ed. 298, 52 S.Ct. 171 (1932), after quoting from the pertinent portion of § 5(2), the Court said:

"It will be noted that the commission was authorized, by the section quoted, to approve the acquisition by one carrier of the control of another by lease or otherwise 'on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.' *It is not only the right but the duty of the commission to impose such conditions as will make the acquisition in the public interest*; for, unless the acquisition is found to be in the public interest, the commission cannot authorize it. *Chicago Junction Case*, 264 U.S. 258, 265, 44 S. Ct. 317, 68 L. Ed. 667." (Emphasis added.)

Thus the Commission is charged with the duty of assuring itself that the ultimate result is in the public interest.

However, the Commission has applied erroneous legal tests to determine the public interest. In its decision, it erroneously restricted its consideration to the issue of which railroads should be authorized to control Peninsula. It did not consider the extensive public interest in adequate and economic transportation service to the publicly owned and developing Rivergate industrial area on the waterfront at Portland, Oregon, accessible to the Columbia-Willamette River system, the second largest river improvement in the United States. The Commission's casual treatment of Rivergate and its failure to treat Portland as one transportation entity illustrate its erroneous use of tests in determining the public interest.

d) THE COMMISSION IGNORED THE RIVERGATE AREA.

The Rivergate industrial area is the key to the public interest aspect of this case. Rivergate, a land area in excess of four square miles, lies at the confluence of the Willamette and Columbia Rivers with direct access to the 40-foot channels of the river development connecting the port of Portland with the Pacific Ocean. The land is owned and being developed by the Port of Portland Commission, a government agency. The area involves major public and private investment and appellant Port of Portland has already invested more than \$5 million of public funds and it estimates that it will expend a minimum of \$50 million in the development of Rivergate. Other public agencies are expected to invest over \$200 million in response to the need for facilities. A conservative estimate of the ultimate public and private investment exceeds \$500 million (Ex. 4, pp. 6-2 and 6-3).^{*} The importance of the area is undisputed and studies made by appellant Port of Portland indicate that at full development 500 to 600 freight cars per day will be handled to, from or within the Rivergate area. (Ex. 1, p. 5-1)

Peninsula is a major entrance to the Rivergate area. As the Rivergate area develops, trackage from Peninsula will be extended to meet the needs of future shippers. Neither SP&S nor Union Pacific need Peninsula for their access to Rivergate (Tr. 124, Ex. 27), but by controlling Peninsula they can block appellants SP and Milwaukee from providing direct rail service to this important public development. (Tr. 278), (Tr. 217). Notwithstanding the presence of the publicly financed Rivergate Development and its obvious importance to the entire public of the Portland area^{**}, the

^{*}All references are to the record before the Commission.

^{**}Rivergate was characterized by a consultant for the Port as follows:

"... We are talking about the industrial area that can project Portland into the twenty-first century." (Tr. 593)

Commission in resolving the public interest factor refused to consider Rivergate, but contrariwise, confined its consideration solely to the small terminal switching carrier, Peninsula Terminal Company. The Commission stated:

"... we consider Peninsula, rather than the entire Portland area, to be the focus of our attention here in resolving the public interest factor." (334 I.C.C. 419, 433)

The Commission in taking such action abrogated the duty imposed upon it by Congress:

As stated in *Detroit, T. & I. R.R., Control*, 275 I.C.C. 455, 488 (1950):

"In determining whether a proposed transaction is consistent with the public interest, consideration must be given to the public affected by the transaction and the effect of the proposal upon adequate transportation service to *all* parts of the public which would be so affected. . . ." (Emphasis added.)

In *City of Hialeah, Fla. v. Florida East Coast Ry., et al.*, 317 I.C.C. 34 (1962), the Commission said:

"... In determining what is 'in the public interest' in a given case, as antecedent to the affirmative exercise of this broad grant of power, we must take into consideration not only the interests of the residents of the city of Hialeah, but the interests of the shippers using the service involved, the interests of the carriers, and the interest of the public in general." (p. 36)

Appellants The Port of Portland and the Public Utility Commissioner of Oregon made it crystal clear that joint ownership of Peninsula by all railroads serving Portland would promote the needed direct access to Rivergate. As Witness Dr. E. Grosvenor Plowman stated, "Joint ownership of Peninsula Terminal by all of Portland's line-haul

railroads is a first step towards providing Rivergate with efficient railroad-type mass transportation." (Ex. 1, p. 2-4) In other words, the public body which owns and is charged with developing the Rivergate area by use of public funds strongly believes that all line-haul railroads serving the Portland area should be allowed to serve the Rivergate area. In fact, the Port and the Oregon Public Utility Commissioner presented extensive evidence that all the Portland railroads must have direct access to Rivergate if Rivergate and the shipping public are to be provided with modern, adequate, economic and competitive rail service (direct operation of unit and semi-unit trains, elimination of complex terminal switching and its delays, maximum single-line routes with their better service, etc.). Only in this fashion can the public interest be served.

By restricting its consideration solely to Peninsula, a small and almost infinitesimal part of what this proceeding is really all about, the Commission clearly did not appraise public interest from the standpoint required.*

b) THE COMMISSION ERRONEOUSLY CONCLUDED THAT TREATMENT OF THE ENTIRE PORTLAND TERRITORY AS ONE TRANSPORTATION ENTITY WOULD ALLOW EVERY RAILROAD IN THE UNDEFINED PORTLAND AREA TO SERVE THE STATIONS AND INDUSTRIES OF ANY OR ALL OTHER RAILROADS.

As an added reason for finding that it was not in the public interest to allow all railroads to serve the Rivergate area, the Commission stated:

"... If we were to adopt the hearing examiner's conclusion, [the examiner based his recommendations upon consideration of the involved area as a whole] we would be providing grounds for every railroad in

*It is significant that the statutory defendant, the United States of America, supported plaintiffs (appellants herein) before the Three Judge Court. It candidly admitted the Interstate Commerce Commission Decision was erroneous.

the undefined Portland area to seek to serve the stations and industries of any or all other railroads..." (334 I.C.C. 419, 433)

Appellants submit this is the application of an erroneous standard to an unsupportable assumption.

Requests for inclusion in a transaction are governed by § 5(2)(d) of the Intrastate Commerce Act (See Appendix G). By the very language of the statute, only when there is a proposed transaction under § 5(2) of the Interstate Commerce Act is it possible for there to be a petition for inclusion under § 5(2)(d). Necessarily, this arises only in the situation of merger, purchase, lease or contract to operate the properties of another carrier or acquisition of control of another said carrier through ownership of its stock or otherwise. Thus, § 5(2)(d) has no standing independently and can only arise when and if an appropriate application is filed under § 5(2). In each case the Commission then determines whether or not the requested inclusion is consistent with the public interest.

Separate and apart from the granting of a request for inclusion is the power of the Commission to subject any approval in a § 5(2) proceeding to such terms and conditions as it shall find to be just and reasonable and consistent with the public interest. (49 U.S.C., § 5(2)(b)) See *M. & M. Transp. Co. v. United States*, 128 F.Supp. 296, 298 (1955), *aff'd*, 350 U.S. 875, 100 L.Ed. 762, 76 S.Ct. 102 (1955); and *Atlantic C. L. R.R. v. United States*, 48 F.2d 239, 244 (1931), *aff'd*, 284 U.S. 288, 76 L.Ed. 298, 52 S.Ct. 171 (1932). Similarly, this power to impose conditions arises *only* when there is a transaction proposed under § 5(2).

There was no request by appellants Southern Pacific or Milwaukee to serve the stations and industries of all other railroads and appellant Southern Pacific, as a railroad

presently serving the Portland area, has never asserted that its mere presence there gave it the right to serve all stations and industries everywhere within that undefined geographical area. To the contrary, all evidence in this proceeding has been pointed directly to the petitions for inclusion filed under § 5(2)(d) of the Act and to the requested condition for trackage rights. Unless and until there is some future transaction proposed pursuant to § 5(2) whereby inclusion or other conditions could be requested, appellants can conceive of no situation which could give rise to the Commission's expressed fear. In any later proceeding, the Commission obviously has full power to either grant or deny requested conditions based upon the evidence adduced.

The Commission's determination that treating the entire Portland area as a transportation entity would allow every railroad in the area to serve the stations and industries of all other railroads is based upon an erroneous legal standard and upon an improper assumption. This mischaracterization of the legal result of granting appellant railroads' requests appears to have been a determining factor in denying their petitions for inclusion under § 5(2)(d) and for requested conditions under § 5(2)(b) of the Act.

2. **There is no substantial evidence to support the Commission's conclusion that service of Union Pacific and SP&S to and from Peninsula is adequate and efficient.**

In determining public interest in a § 5(2) transaction the Commission is directed by Congress to give weight, among other things, to "the effect of the proposed transaction upon adequate transportation service to the public". 49 U.S.C., § 5(2)(c).

This Court has pointed out that in a § 5(2) proceeding "public interest" is not "a concept without ascertainable criteria but has direct relation to adequacy of transportation service, to its essential conditions of economy and

efficiency, and to appropriate provision and best use of transportation facilities." (*New York Central Securities Corp. v. United States*, 287 U.S. 12, 25, 77 L.Ed. 138, 53 S.Ct. 45, 48 (1933).) In this proceeding, appellants Southern Pacific and Milwaukee seek inclusion as equal owners of and access to Peninsula so that they may serve industries in the developing Rivergate area. SP&S and Union Pacific presently reach the Willamette River on west side of Rivergate. Peninsula is immediately adjacent to Rivergate on its Columbia River or east side. Nonetheless the Commission in its decision characterizes the requests for inclusion as "invasion of the joint applicants' territory". The Commission then cites its well-established rule that:

"... a railroad now serving a particular territory should normally be accorded the right to transport all traffic therein which it can handle adequately, efficiently, and economically, before a new operation should be authorized. . . ." (334 I.C.C. 419, 433)

Thus, the test to be applied in determining whether a carrier already serving the area should be allowed to handle all traffic without competition from a new operation is whether it can adequately, efficiently and economically handle all present and future traffic in the territory. E.g., *Northern Pac. Ry. Constr.*; 295 I.C.C. 281, 294 (1956). If the carrier or carriers already serving the area cannot do so, they are not entitled to exclusively serve the territory. Rather, the public interest compels inclusion of other railroads desiring to serve the territory. Appellants unequivocally state that the record in this proceeding is patently clear that the Union Pacific and SP&S are not providing adequate and efficient service to Peninsula today and that they will not provide such service in the future.*

*Union Pacific even admitted to shipper Crown Zellerbach that a 48-hour delay would be encountered in the future. See Crown Zellerbach Petition for Reconsideration and Further Hearing. Exhibit A.

Appellant Southern Pacific introduced the results of a ten percent random sample showing the extraordinary length of time taken by Union Pacific and SP&S in delivering Southern Pacific cars destined to or from Peninsula during the year 1967. (Exhibit 45) Furthermore, the General Manager of Union Pacific admitted that it took approximately 30 hours for Southern Pacific cars to move from Union Pacific's Albina Yard to the North Portland interchange, a distance of approximately 5.2 miles. (Tr. 181-82) The examiner in his report characterized this average transit time as "incredible". (Sheet 42) The record reveals unanimous agreement that such service was inadequate.

(1) The Traffic Manager of SP&S so testified. (Tr. 276)

(2) The Vice President and General Manager of SP&S was also critical of the service. (Tr. 87)

(3) The witness on behalf of the Brotherhood of Railway Clerks agreed that 30 hours was not a reasonable time nor adequate service. (Tr. 649)

(4) Shipper witnesses also agreed as to the inadequacy of this service. (Tr. 393)

In short, there was not a single witness who would venture to state that the present service being provided by Union Pacific between Albina and North Portland was adequate or efficient service.

There simply is no substantial evidence to support the Commission's finding that Union Pacific and SP&S are providing adequate and efficient service to Peninsula. The Commission's characterization of appellants' requests as an "invasion of the joint applicants' territory" ignores the fact that the Rivergate area is publicly owned and being developed with public funds. Furthermore, there is a long

*Contrast this 30-hour transit time with the same witness's testimony that the direct move could be made in approximately 45 minutes. (Tr. 211)

line of authority that a common carrier railroad is not entitled to exclusively serve a territory and has no exclusive right to present and future rail traffic. *Chesapeake & O. Ry. Constr.*, 267 I.C.C. 665, 679 (1947). As the court stated in *Pennsylvania R.R. v. United States*, 40 F.2d 921 (1930):

"... It is equally certain that the written law—the Transportation Act of 1920—does not explicitly or implicitly accord a noncompetitive traffic area to the first taker as the law accords a trade-mark to the first adopter. Instead of doing this the written law negatives such a right by providing expressly for the invasion by one carrier into a territory exclusively served by another on a showing of convenience and necessity of more transportation service for those inside reaching out and those outside reaching in:..." (p. 925)

3. The rejection by the Commission of common use of terminal facilities pursuant to § 3(5) of the Interstate Commerce Act was based on erroneous conclusions of law.

The Commission's rejection of the applications filed in Finance Dockets Nos. 24890 and 24891 pursuant to § 3(5) of the Interstate Commerce Act is found in the following language:

"... The intent of Congress in enacting section 3(5) was to provide a method of avoiding the necessity for incurring unnecessary expense in duplicating existing terminal facilities by a railroad entitled to serve a particular territory. Cf. *Use of Northern Pac. Tracks at Seattle by Great Northern*, 161 I.C.C. 699. For a more recent case, see *Seaboard Air Line R. Co.—Use of Terminal Facilities*, 327 I.C.C. 1, where one railroad was authorized to acquire common use of another's facilities in order to continue service to a port which

had been removed to a new location.¹ In the instant case, SP is not entitled to serve Peninsula or Rivergate. Therefore, there is no question of avoiding costly construction from SP's present Portland terminus to Peninsula through the acquisition of the common use rights it requests. Accordingly, we find no ground for authorizing the requested common use." (334 I.C.C. 419, 435)

"11. This case was cited by SP in support of an allegation that an invasion of territory may be accomplished by means of a section 3(5) authorization. Since the railroad acquiring the common use rights was actually serving the port involved, in the port's old location, and would continue to render the same service in the new location, there was no invasion of another railroad's territory and the cited case does not support SP's allegation."

The fact is the Commission completely failed to deal in its report with the situation presented by the Application in Finance Docket No. 24891. That Finance Docket sought the common use of terminal facilities of Union Pacific between Peninsula Terminal Company and the Southern Pacific-Union Pacific connection at East Portland, Oregon. (Application, p. 5) Union Pacific trackage, over which bridge rights were sought, are themselves "terminal facilities" within the statute. This is settled by the decision in *Seaboard A. L. R.R.—Use of Terminal Facilities*, 327 I.C.C. 1 (1965), where the Commission held:

"... The East Coast tracks involved herein, being used as they are entirely for serving shippers in the City of Miami and the area of the port, can themselves be considered terminal facilities; ..." (p. 3)

And on appeal, a Three Judge Court held:

"... the tracks owned by East Coast and sought to be used by Seaboard are 'terminal facilities' within the meaning of § 3(5). Accord, *City of Milwaukee v. Chicago & N. W. Ry.*, 283 I.C.C. 311 (1951)." (256 F.Supp. 986, 989 (1966))

The case was affirmed by this Court at 386 U.S. 8, 17 L.Ed.2d 699, 87 S.Ct. 851.

In support of its position, the Commission cited two cases. The first case, *Use of Northern Pac. Tracks at Seattle by Great Northern*, 161 I.C.C. 699 (1930), is an unusual fact situation; nevertheless, there is nothing in the case which holds that joint ownership was a necessity or a prerequisite to the granting of § 3(5) relief. The second cited case, *Seaboard A. L. R.R.—Use of Terminal Facilities*, *supra*, did not have the element of joint ownership of the facilities to which trackage rights were sought. To the contrary, Seaboard (the petitioner) did not have any ownership in the terminal facilities since they were owned entirely by the Dade County Sea Port Department. An attempt to distinguish the case on the ground that Seaboard had formerly served the old port prior to its relocation is in the view of appellants a specious argument. The relief granted by the Commission in the case stands in the face of the fact that Seaboard had no right to serve the new port and whether or not it had rights to serve the old port should have no bearing upon the matter. To hold otherwise could give rise to the following situation: If a large industry with numerous track facilities located exclusively on railroad *x* decided to move its location to an exclusive point on railroad *y*, then railroad *x* could claim that it was entitled under § 3(5) as a matter of right to reach the new industry location over the tracks of railroad *y*.

Furthermore, there is other authority that § 3(5) relief can be granted even though there have been no past rights or past ownership in the area sought to be reached. See *Erie R.R. Acquisition*, 275 I.C.C. 679 (1950). In that case the Erie sought authorization to acquire and operate former trackage of International Railway Company, which had been authorized to abandon the trackage. International Railway Company, by contract, operated over trackage of

New York Central to reach an industrial area called Lower Town. The agreement between International and New York Central was not assignable and Central refused to make a similar assignment with Erie. Erie then sought authority under § 3(5) of the Act for rights over the New York Central line into Lower Town. The Commission granted relief under § 3(5) and accorded Erie the right to operate over New York Central trackage directly to Lower Town.

Appellants submit that contrary to the Commission's holding there is no requirement that the railroad seeking relief under § 3(5) actually be entitled to serve the terminal facilities sought to be reached. *Erie R.R. Acquisition, supra*, clearly holds that ownership in or former service to a particular area is not required for the granting of relief under § 3(5).

4. **The Commission sanctioned a violation of the antitrust laws by permitting SP&S and UP to acquire and control Peninsula Terminal without conditioning said approval upon appellants Southern Pacific and Milwaukee being equal owners of, with access to the lines of Peninsula.**

It is settled that there is no direct application of the antitrust laws to corporate affiliations which are approved pursuant to § 5(2) of the Interstate Commerce Act, although antitrust principles must be considered in such transactions, *McLean Trucking Co. v. United States*, 321 U.S. 67, 88 L.Ed. 544, 64 S.Ct. 370 (1944). As explained in that case, § 5(11) exempts corporate affiliations considered and approved in § 5(2) proceedings from the antitrust laws only where the Commission makes adequate findings that such an affiliation is consistent with the public interest and where such findings are adequately supported by evidence.

This Court summarized as follows:

"In short, the Commission must estimate the scope and appraise the effects of the curtailment of competi-

tion which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry.... If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order." (pp. 87-8) (Emphasis added.)

As we have demonstrated, the Commission erred in focusing only on Peninsula to resolve the factor of public interest (*supra*, p. 8), and in finding the UP service to and from Peninsula adequate and efficient (*supra*, p. 13). These errors were used to justify finding the transaction consistent with the public interest even though appellants' petitions for inclusion and requested conditions for trackage rights were denied. To restrict rail service to Peninsula and the Rivergate area to only two of the railroads presently reaching Portland is not in the overall public interest and cannot be found to be consistent with the public interest.* Inasmuch as these erroneous findings are not adequately supported by evidence, the Commission has unlawfully sanctioned a violation of the antitrust laws and the immunity from antitrust legislation provided by § 5(11) of the Interstate Commerce Act has been lost.

*Cf. *Illinois Central R.R. v. Norfolk & Western Ry.*, 385 U.S. 57, 17 L.Ed.2d 162, 87 S.Ct. 255 (1966), approving access by eight railroads to Lake Calumet Harbor Port in the Chicago area.

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted.

Respectfully submitted,

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Appendix A

*In the United States District Court
for the District of Oregon*

Civil No. 69-696

Port of Portland,
Sam R. Haley, Public Utility
Commissioner of Oregon,
Commission of Public Docks
of City of Portland, Oregon,

Plaintiffs,

vs.

The United States of America
and Interstate Commerce Commission,

Defendants,

Chicago, Milwaukee, St. Paul
and Pacific Railroad Company,

Plaintiff in Intervention.

ORDER AND JUDGMENT

The Court finds that the report and order of the Interstate Commerce Commission (Commission), Division 3, decided June 6, 1969, and the orders of the Commission, Division 3, dated October 24, 1969, and November 21, 1969, in its Finance Docket Nos. 24679, 24890, and 24891, Spokane, Portland & Seattle Railway and Union Pacific Railroad Company—Control—Peninsula Terminal Company, 334 ICC 419, are supported by substantial evidence and are neither arbitrary nor capricious;

Now, THEREFORE, the orders of the Commission are affirmed, and this action is dismissed.

Dated this 9th day of July, 1970.

John F. Kilkenny

United States Circuit Judge

Gus J. Solomon

United States District Judge

Robert C. Belloni

United States District Judge

Appendix B

Served June 20, 1969

F-9530

Interstate Commerce Commission

FINANCE DOCKET NO. 24679¹

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY
—CONTROL—PENINSULA TERMINAL COMPANY

Decided June 6, 1969

1. In Finance Docket No. 24679, acquisition by the Spokane, Portland & Seattle Railway Co., and the Union Pacific Railroad Co., of control of the Peninsula Terminal Company through purchase of capital stock, approved and authorized. Conditions prescribed. Petitions of the Chicago, Milwaukee, St. Paul and Pacific Railroad Co., and the Southern Pacific Co., for inclusion in the transaction denied.
2. In Finance Docket Nos. 24890 and 24891, joint use, under section 3(5) of the Interstate Commerce Act, by Southern Pacific Co. of facilities of the Peninsula Terminal Company and trackage of the Union Pacific Railroad Co., found to be not in the public interest and applications denied.

Hugh L. Biggs, Charles W. Burkett, James Warren Cook, Richard Devers, Thomas H. Gonser, Randall B. Kester, F. J. Melia, Raymond K. Merrill, Warren H. Ploeger, Thomas H. Ploss, E. O. Schiewe, R. Paul Tjossem, John F.

1. This report also embraces Finance Docket No. 24890, Southern Pacific Co.—Common Use of Terminal Facilities—Peninsula Terminal Co., and Finance Docket No. 24891, Southern Pacific Co.—Common Use of Certain Terminal Facilities—Union Pacific Railroad Co.

Weisser, W. Harney Wilson and Oglesby W. Young for applicants and petitioners.

Lloyd A. Combs, Dale T. Crabtree, Samuel P. Delisi, William M. Dunegan, John L. Green, Richard H. Kraushaar, Robert K. Little, Hollis Menow, Milton A. Mowat, Harold A. Ross, Richard W. Sabin, Robert W. Skirvin, Edgar E. Smith, Lofton L. Tatum, Robert Y. Thornton, Homer C. Watson, Milton A. White and Henry M. Wick, Jr., for protestants and interveners.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, DEASON, AND STAFFORD
STAFFORD, *Commissioner*:

Exceptions to the hearing examiner's report and recommended order have been filed jointly by the Spokane, Portland and Seattle Railway Company (SP&S) and the Union Pacific Railroad Company (UP), separately by UP, the Southern Pacific Company (SP) and the Brotherhood of Locomotive Engineers (BLE). Replies to exceptions were filed by SP&S and UP (joint applicants), SP, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee), the Port of Portland (the Port), and the Public Utility Commissioner of Oregon (Oregon Commission). The applicants request oral argument. However, in our opinion the issues herein can be disposed of without hearing the parties orally and the applicants' request is denied. Our conclusions herein differ from those of the hearing examiner.

In the title proceeding, Finance Docket No. 24679, the joint applicants on July 25, 1967, sought authority under section 5(2) of the Interstate Commerce Act to acquire control of the Peninsula Terminal Company (Peninsula) through

the purchase of its entire capital stock in equal shares. By petition filed August 23, 1967, Milwaukee, under section 5(2)(d) of the act, seeks inclusion in the transaction for authority (1) to purchase one-third of the capital stock of Peninsula from its present owner upon the same terms and for the same per-share consideration as the joint applicants; (2) to pay one-third of the purchase price of two diesel locomotives sold Peninsula by the latter's present owner; and (3) to acquire trackage rights over tracks owned jointly by the joint applicants and connecting SP&S with Peninsula. By petition filed November 2, 1967, and amended petition filed November 29, 1967, SP seeks inclusion in the transaction (1) as an equal joint owner of Peninsula; (2) as a condition to such joint ownership to acquire trackage rights over UP's main line between the UP-SP track connection in UP's East Portland Yard (the present Portland terminus of SP) and Peninsula in North Portland, via UP's Albina Yard, St. John's Junction, the UP tunnel, Peninsula Junction and the UP connection with Peninsula, approximately 6.75 miles, all in East Portland, Oreg.; and (3) in the event the joint applicants decline to acquire ownership of Peninsula subject to SP's inclusion, for an order pursuant to section 3(5) of the act authorizing common use by SP and the UP track referred to in (2).

In Finance Docket No. 24890, by application filed December 21, 1967, SP seeks authority under section 3(5) of the act, for common use of the terminal facilities of Peninsula and bridge traffic rights over the line of UP described above between Peninsula and the UP-SP track connection in East Portland Yard.

In Finance Docket No. 24891; by application also filed December 21, 1967, SP seeks authority under section 3(5) of the act for common use of the terminal facilities of UP

between Peninsula and the UP-SP connection in East Portland Yard. The joint applicants, Milwaukee, SP and Peninsula are common carriers by railroad subject to regulation under the provisions of part I of the act.

THE PARTIES

A detailed description of the railroad parties to these proceedings, their operations in the Portland area and their positions with respect to the applications and petitions involved herein are set out in excerpts from the hearing examiner's report appended hereto. These excerpts, to the extent they describe the common carriers involved in these proceedings, are adopted as our own and a detailed description of the railroad parties will not be set out here except as follows for clarity of discussion.

Peninsula.—This carrier was incorporated in Oregon on June 5, 1918. It operates approximately 3.79 miles of terminal switching railroad in East Portland, serving 14 industries, pursuant to authority granted in *Peninsula Term. Co. Operation*, 166 I.C.C. 597. Ownership of the entire 1,500 shares of its outstanding capital stock by its present owner, United Stockyards Corporation (United) was authorized on March 9, 1943, in *Stockyards Ry. Co. Control*, 254 I.C.C. 207.

The interest of the Port, SP and Milwaukee in the purchase of Peninsula's control by SP&S and UP is based on the fact that at the western end of Peninsula's trackage is the Rivergate Industrial District (Rivergate), consisting of about 2,942 acres of land owned, and under development, by the Port at the junction of the Columbia and Willamette Rivers, generally north of and adjacent to the corporate limits of Portland, Oreg. Rivergate has about 6 miles of

waterfront on the 40-foot navigation channels of the two rivers. Much of the Rivergate land is unoccupied and has yet to be reclaimed. According to the Port, about 500 acres are filled to usable grade and another 300 are now undergoing filling by a pipeline dredge.

The Port's consultants, in an 18-month's study of the area in which Rivergate is located recommended, among other things, that a Rivergate rail system be constructed to connect with rail trunklines. Two alternate rail access routes to Rivergate include a route over existing tracks of the Port which connect with tracks jointly owned by the joint applicants entering Rivergate from the southwest and another route based upon the possible construction on the eastern side of Rivergate of an SP&S main-line extension or an extension of Peninsula's tracks into the area.

Six industries now occupy about 265 acres, or slightly less than one-tenth of the Rivergate area. On the west, or Willamette River, side of Rivergate are a chemical lime plant, occupying 30 acres; an aluminum foundry, 20 acres; an area packaging plant, 25 acres; an integrated steel mill, 150 acres; and since the closing of the record herein, a waterways terminal. The remaining industry is the pole-yard of the Crown Zellerbach Corporation (Zellerbach) located on the east, or Columbia River, side of Rivergate. Of the foregoing Rivergate industries, only Zellerbach is now served by Peninsula. It is served by means of its own industrial trackage, which connects with Peninsula's track. The remaining 13 industries served by Peninsula are located on, or adjacent to, its main and side tracks on the land which Peninsula occupies.

SP&S.—This joint applicant was incorporated on August 23, 1905, in the State of Washington. Its present name was adopted on February 1, 1908. It owns and operates a line

of railroad in Oregon and Washington. Its entire 400,000 shares of capital stock are held equally by the Great Northern Railway Company and the Northern Pacific Railroad (NP). It is presently involved with its parent carriers and another of their subsidiaries, the Chicago, Burlington & Quincy Railroad Company, in a consolidation of their respective systems. This consolidation has been approved and authorized by the Commission and is undergoing review by the United States Supreme Court. See *Great-Northern Pac.—Merger—Great Northern* 331 I.C.C. 228 and 331 I.C.C. 869 (*Northern Lines* case.)

As a condition to consummating the consolidation, the parties thereto are required by condition No. 24 of appendix L to the *Northern Lines* case (see footnote 5, *infra*) to provide access, to Milwaukee, via trackage rights, to the city of Portland, which has not heretofore been served by Milwaukee.

UP.—The other joint applicant owns and operates over 9,500 miles of track in the States of California, Colorado, Idaho, Iowa, Kansas, Missouri, Montana, Nebraska, Nevada, Oregon, Utah, Washington, and Wyoming. Its outstanding capital stock is widely diversified and it is not controlled by any other carrier.

SP.—This carrier is a Delaware corporation owning and operating a line of railroad through the States of Oregon, California, Nevada, Utah, Arizona, New Mexico, Texas, and Louisiana. Like UP, its outstanding stock is widely diversified and it is not controlled by any other carrier.

Milwaukee.—The fifth and last common carrier involved here is a Wisconsin corporation operating a line of railroad in the States of Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Montana, Nebraska, North Dakota, South Dakota, Washington, and Wisconsin. Its principal transcontinental line extends from Chicago to Longview,

Wash., a point on the lower Columbia River 46-rail miles north of Portland. As previously stated, it will obtain access to the latter point, for the first time, via trackage rights granted by condition No. 24 in the *Northern Lines* case, upon consummation of the consolidation authorized in that proceeding. It is also presently involved in Finance Docket No. 24182, Chicago, Milwaukee and North Western Transportation Company — Consolidation — Chicago and North Western Railway Company and Chicago, Milwaukee, St. Paul and Pacific Railroad Company. This application has been heard and is pending decision by the Commission.

THE PROPOSED TRANSACTIONS

SP&S and UP.—As recited in the appendix, United is no longer interested in operating Peninsula. It has no preference with respect to purchasers of Peninsula but offered the property to SP&S as one of the railroads connecting physically with Peninsula. SP&S communicated United's offer to UP, the other physical connection. The two connecting railroads now propose to purchase, in equal shares, all of Peninsula's outstanding stock from United for \$299,405 in cash, adjusted to reflect changes in value of Peninsula's property occurring between February 28, 1967, the date of the purchase contract, and the closing date of the transaction,² plus the sum of \$70,000 to reimburse United for two switch engines it sold to Peninsula.

Milwaukee.—As indicated above and in the appendix, Milwaukee presently performs no physical operations to

2. The closing date of the transaction will be no later than the first day of the month following our approval of the purchase of Peninsula and the acceptance by the parties of any conditions we may impose in connection therewith.

and from Portland. However, with its entrance into that point authorized as an incident to consummation of the *Northern Lines* case, and upon its inclusion in this transaction, it plans to serve all the industries on Peninsula's tracks with no absorption of switching charges. Contingent upon the extension of its operations to Portland pursuant to the *Northern Lines* case, Milwaukee requests joint and equal ownership of Peninsula's stock with the other trunk-lines and considers joint ownership of Peninsula essential to its Portland operations insofar as the industries located on Peninsula and in Rivergate are concerned.

Milwaukee asserts that if its petition for inclusion is denied and the *Northern Lines* consolidation is consummated, its traffic to North Portland would move to Guild's Lake Yard, about 6 miles south of North Portland. The traffic would then be switched back to North Portland. This back movement, according to Milwaukee, would require an extra day in transit and be to Milwaukee's competitive disadvantage because the joint applicants, by virtue of their ownership of Peninsula, could fix Milwaukee's switching charges and direct operation of Peninsula to meet their own operating requirements rather than those of Milwaukee.

UP contends, in effect, that we lack jurisdiction to grant Milwaukee's petition for inclusion inasmuch as (1) Milwaukee is not a railroad "in the territory involved" within the meaning of section 5(2)(d) of the act;³ (2) Milwaukee will

3. Section 5(2)(d) of the act provides that:

The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

be unable to serve the Portland terminal area, even though the *Northern Lines* case is consummated, without further authority under sections 1(18) and 5(2) of the act; and (3) the tracks connecting Peninsula and SP&S are jointly owned by UP, SP&S and NP, therefore, since condition No. 24 of the *Northern Lines* case is not applicable to UP and since joint use of this track cannot be granted over UP's objections in these proceedings, Milwaukee would be unable to reach Peninsula. UP and SP&S contend that Milwaukee's joint ownership of Peninsula would be contrary to the public interest and UP alleges that such joint ownership and control would lead to cumbersome, confused and divided management and thus, would not be in the public interest.

BLE and other labor organizations oppose the Milwaukee petition because, if granted, it would reduce employment at other yards in Portland by eliminating switching and interchange operations.

SP.—As previously stated, SP requests a condition to approval of the SP&S-UP application providing for its inclusion as an equal joint partner in the ownership of Peninsula and as a condition to such ownership, trackage rights over UP's main line and the terminal trackage between Peninsula and the SP&S-UP track connection at East Portland. SP asks that it be authorized to use the UP trackage under section 3(5) of the act in the event either or both of the joint applicants decline to participate in the acquisition of Peninsula subject to the conditions SP requests.⁴

4. Section 3(5) of the act provides, in part, that:

If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal

Also because of the permissive nature of our authorizations under section 5(2), SP filed its applications in the two embraced cases to assure common use of the terminal facilities of Peninsula and UP's terminal facilities between Peninsula and the SP-UP connection at East Portland and bridge traffic rights over UP's line between Peninsula's line and the connection between SP and UP, even though the joint applicants refused to consummate any authorization of their purchase of Peninsula.

Under its proposals, SP alleges that faster service to Peninsula's industries can be offered through its service and that it anticipates no operating difficulties or labor complications in connection with its proposals. It argues that Rivergate is unique in that it includes several thousand acres of publicly owned industrial land that depends upon the flexibility of rail service for successful development.

As in the case of Milwaukee's proposal, UP opposes SP's petition on the grounds that SP like Milwaukee is not a railroad "in the territory involved;" the management of Peninsula would become difficult and indecisive with four owners; and that ownership by the joint applicants would assure keeping the size of Peninsula's yard facilities and the cost of its operation at a minimum. UP opposes the operation by SP through UP's Albina Yard, that would result from the bridge trackage rights requested by SP,

facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon; or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. • • •

because of the congestion it would create. It asserts that SP operation in the yard would result in uneconomical and wasteful conditions there and that operation of SP trains through Albina Yard is not practical because of the large number of trains already moving through the yard.

The labor organizations appearing in the proceeding oppose SP on the same grounds they oppose Milwaukee; the loss of jobs that would ensue from the petitioners' proposals.

Interveners.—The petitions and applications of Milwaukee and SP are supported by the Port, the Portland Commission of Public Docks, city of Portland and the Oregon Commission. The positions of these interveners are set forth in the excerpts from the hearing examiner's report appended hereto and need not be repeated here.

SP and Milwaukee, particularly the former, are also supported by Zellerbach, the Oregon Steel Mills and Collier Carbon & Chemical Corporation, all industries located, or preparing to locate, in Rivergate. Excerpts from the hearing examiner's report containing a discussion of their positions are also included in the attached appendix. The excerpts describing public agency and shipper interveners' positions are appended for information purposes only. The positions they reflect are not to be understood as having been adopted by us. Williamette Wood Products, Inc., Morrison Oil Company and Serendip Industrial Materials of Portland, Oreg., support the application of the joint applicants.

HEARING EXAMINER'S RECOMMENDATIONS

In the title proceeding, generally, the hearing examiner recommends approval of the sale of Peninsula's stock control to SP&S, UP, and SP in equal shares, subject to sale by each of a one-twelfth interest to Milwaukee upon con-

summation of the *Northern Lines* case and the filing by Milwaukee of an application under section 1(18) of the act for authority to operate between Longview Junction and Portland. He would also grant the joint use authority requested by SP under section 3(5) of the act.

In the embraced proceedings, the hearing examiner would grant the applications of SP under section 3(5) of the act.

For the protection of railway employees, the hearing examiner recommends imposition of the conditions originally prescribed in *Chicago & N. W. Ry. Co. Merger*, 261 I.C.C. 672, 675 (*North Western* conditions), which provide that:

During the period of 4 years from the effective date of our order herein such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this section shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order.***

EXCEPTIONS TO HEARING EXAMINER'S REPORT

The parties filing exceptions to the hearing examiner's recommendations continue to press, on exceptions, the same general positions they adopted at the outset of these proceedings.

Exceptions of SP&S and UP.—The joint applicants contend that SP and Milwaukee are not "railroads within the territory involved" and that even if the *Northern Lines* case is consummated, Milwaukee, under the terms of condition No. 24(a) of appendix L to the *Northern Lines* case, and under the decision of the United States Supreme Court

in *Texas & Pac. Ry. v. Gulf, Etc.*, 270 U.S. 266 (1926), would be unable to serve Peninsula and the Portland area without first securing a certificate of public convenience and necessity permitting an extension of its line of railroad to Portland under section 1(18) of the act.⁵ They contend that undue emphasis is placed on the future development of Rivergate and that the hearing examiner erroneously holds the Portland terminal area to constitute one terminal entity. They argue that the evidence does not support a four-way ownership of Peninsula, either from a general public or a shipper standpoint, and that common use by SP of the Peninsula and joint-applicant facilities is not in the public interest.

The replies of SP, Milwaukee, the Port and the Oregon Commission to the exceptions of the joint applicants are, like those exceptions, mostly reflections of the repliants' positions from the outset of the proceedings and agree generally with the findings of the hearing examiner with respect to the petitions and applications of SP and Milwaukee.

Exceptions of SP.—The exceptions of SP are taken to details in the hearing examiner's findings relating to compensation for the use by SP of UP interchange trackage and access by SP over intervening UP trackage. The joint applicants, in reply, take a contrary view to the points raised by SP.

5. Condition No. 24, and subparagraph (a) thereof, state:

24. At the request of the Milwaukee, presented in writing not more than 6 months after date of consummation of the unification authorized herein or not more than 6 months after the effective date of any certificate or order of this Commission.

(a) Permitting that railroad to extend its operations to Portland, Oreg., and to acquire trackage rights over the line of NuCo [the consolidated carrier resulting from consummation of the Northern Lines case] between Longview Junction, (footnote continued on next page)

Exceptions of BLE.—On exceptions, BLE reiterated its support for the acquisition of Peninsula by the joint applicants, which it considers to be in the public interest, and its objection to the petitions and applications of Milwaukee and SP. It also objects to the so-called *North Western* conditions recommended by the hearing examiner for the protection of employees and requests the imposition of "attrition" conditions similar to those imposed in the *Northern Lines* case.⁶ If we consider that this case does not merit full attrition conditions, BLE requests the imposition of the so-called *New Orleans* conditions as prescribed in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271.

Whichever conditions are imposed, the BLE alleges that they should be extended to protect the employees of North Portland Terminal Company if the petitions and applications of Milwaukee and SP are granted since such grants would permit SP, in particular, to bypass North Portland terminal in serving Peninsula industries, to the detriment of the North Portland employees.

(footnote 5 continued)

Wash., and Portland, Oreg., NuCo shall grant to the Milwaukee, upon such fair and reasonable terms as the parties may agree, or as determined by this Commission in the event of their inability to agree, trackage rights to operate freight trains over NuCo lines between Longview Junction and Portland, including the right to serve on an equal basis all present and future industries at Portland and intermediate points and the use of NuCo facilities at Portland necessary for the switching of traffic to other railroads and industries. NuCo shall maintain Portland as an open gateway on a reciprocal basis with the Milwaukee to the same extent as with other connecting carriers;

6. In previous reports, "attrition" has been held to mean that "no reduction in force of employees shall occur other than principally by death, retirement, discharge for cause or resignation." For simplicity, the phrases "attrition conditions," "attrition protection," or "attrition agreement" are used in Commission reports to reflect this concept. See *Chesapeake & O. Ry. Co.—Control—Western Maryland Ry. Co.*, 328 I.C.C. 684, 715.

In reply to BLE's exceptions, the joint applicants allege that if they are authorized to acquire control of Peninsula, there will be little change in the operation of that carrier. Consequently, there will be little or no effect on railway employees and the *North Western* conditions recommended by the hearing examiner will afford sufficient protection to the employees.

DISCUSSION AND CONCLUSIONS

Title proceeding.—The record establishes that the purchase of Peninsula by SP&S and UP will be in the public interest. The joint applicants now connect with Peninsula and the present service by Peninsula to its industries will be unaffected by the substitution of joint applicant's control for that of United. Furthermore, it will be in the public interest for control of Peninsula to pass from the noncarrier, which no longer desires it, to carrier auspices and on this record the most logical owners would be Peninsula's connecting carriers. It does not appear from the record, nor does any party contend, that the purchase price for Peninsula, arrived at by the parties through arm's length bargaining, is unreasonable or that it would jeopardize the financial structure of the joint applicants. After due consideration we can find no reason for withholding approval of our authority for the purchase. However, no stock or securities are to be issued or any obligation or liability assumed in connection with such purchase without our prior approval under section 20a of the act.

Jurisdiction over petitions for inclusion.—We do not agree with the joint applicants' contention that because SP and Milwaukee do not physically connect with Peninsula, they are not "railroads in the territory involved" within the meaning of section 5(2)(d), and, therefore, that we lack

jurisdiction to require their inclusion in the title proceeding.⁷ Our authority to require inclusion of another carrier in cases of this nature does not arise primarily from section 5(2)(d). Instead it arises from the power conferred upon us by section 5(2)(b) to impose terms, conditions and modifications to our section 5(2) authorizations.⁸ The only test required by section 5(2)(b) of terms, conditions, and modifications is that they be just and reasonable. See *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 328 I.C.C. 304, 326.

Section 5(2)(d) does not limit our conditioning power under section 5(2)(b) with respect to other railroads. It merely requires us to give weight to the petitions of "other railroads in the territory involved" and to include such other railroads in a transaction if the public interest for such inclusion is shown. Cf. *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 330 I.C.C. 780, 787-788. Accordingly, we may require the inclusion of SP and Milwaukee in the title proceeding, if we find such inclusion to be just and reasonable, i.e., in the public interest, regardless of whether either or both of the petitioners can meet the joint applicants' technical definition of a railroad or "railroads in the territory involved." Of course, the lack of any

7. See footnote 3 regarding section 5(2)(d) of the act.

8. Section 5(2)(b) provides that

Whenever a transaction is proposed under sub-paragraph (a) [to section 5(2)], the carrier or carriers or person seeking authority therefor shall present an application to the Commission, . . . If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable.

physical connection is a factor for consideration in determining whether a condition requiring inclusion is just and reasonable.

We also disagree with the joint applicants' contention that without a certificate of convenience and necessity under section 1(18) of the act for an extension of its line of railroad to Portland, Milwaukee cannot be included in this proceeding.

Condition No. 24(a) to the *Northern Lines* case⁹ grants Milwaukee the right to acquire trackage rights over Northern Lines track between Longview Junction, Wash., and Portland, Oreg., provided, of course, the consolidation authorized in the *Northern Lines* case is consummated. A certificate under section 1(18) of the act is necessary before a carrier can legally extend its operations over trackage not theretofore operated in interstate and foreign commerce. However, if the trackage is already operated in interstate commerce (in effect, it is already certificated), only section 5(2) authority is required. The lessee under a trackage rights agreement in such case merely succeeds to the right to operate the line, within the limits of the trackage rights contract, of the lessor railroad. See *International—G. N. R. Co. Trustee Trackage Rights*, 275 I.C.C. 27, 33.

The joint applicants are misinterpreting condition No. 24(a) by arguing that it requires applications (both of which, of course, would be subject to protests) under section 1(18) and section 5(2) before Milwaukee can extend its lines via *Northern Lines* trackage into Portland. As used in the condition, the language "Permitting that railroad to extend its operations to Portland, Oreg., and to acquire trackage rights over the line of NuCo between Longview Junction, Wash., and Portland, Oreg.," is only intended to emphasize the fact that Milwaukee is, in the

⁹ See footnote 5.

Northern Lines case, accorded access for the first time to Portland. The Commission did not intend, and did not state in condition No. 24, that Milwaukee must first seek approval under section 1(18) of the act for an extension of its line of railroad over *Northern Lines* trackage before it could request authority under section 5(2) to acquire the trackage rights necessary for its entry into Portland. The question of whether a certificate of public convenience and necessity under section 1(18) is necessary before railroad service can be extended by trackage rights over the line of another carrier was decided in the negative by the Commission over 20 years ago in *Chicago, B. & Q. R. Co. Control*, 271 I.C.C. 63, 66-67, and we can find nothing in the *Northern Lines* case to indicate that the Commission intended to reverse that longstanding precedent.

The decision in *Texas & Pac. Ry. v. Gulf, etc. Ry., supra*, cited by joint applicants in support of their section 1(18) argument was, of course, decided prior to the enactment of the Transportation Act of 1940, placing the regulation of trackage rights acquisitions under the provisions of section 5(2) of the act instead of under section 1(18) where such regulation had previously been vested. Accordingly, the cited proceeding is inapplicable to the situation here.

We are satisfied, and we so find, that it is within our jurisdiction to determine whether, on this record, SP and Milwaukee should be included within the transaction.

Merits of petitions for inclusion.—Though we possess the necessary jurisdiction to require inclusion of Milwaukee and SP in a four-railroad control of Peninsula and to authorize the common use of terminals and facilities requested by SP, such control must meet the public interest requirement before any condition we might impose in these respects can be found just and reasonable.

With respect to Milwaukee's petition, we wish to point out that this case cannot be viewed as part of the general realignment of western railroad competition resulting from the Commission's approval of the *Northern Lines* merger. Condition No. 24 of the *Northern Lines* case grants Milwaukee the right of access to Portland and the right to serve industries therein; however, this condition is applicable only to *Northern Lines* trackage and territory. The condition is silent with respect to trackage and territory in which other carriers, such as UP, have a joint interest and the effect of the condition upon such joint trackage and territory was not presented to, nor considered by, the Commission. Furthermore, the instant application and Milwaukee's petition for inclusion therein, were not filed until after the record was closed in the *Northern Lines* case, and not until long after the *Northern Lines* applicants had agreed to Milwaukee's request for imposition of condition No. 24. Thus, the purchase of Peninsula by the joint applicants was not within the contemplation of the Commission at the time condition No. 24 was imposed. Milwaukee's inclusion in that purchase cannot, therefore, be considered to implement that condition; and a denial of its petition for inclusion would take nothing from Milwaukee that it was granted in the *Northern Lines* case nor be contrary in any way to the spirit and intent of the Commission to accord Milwaukee the right of access into Portland over *Northern Lines* trackage. Accordingly, we consider the petition of Milwaukee under the same public interest criteria as the petition and applications of SP, rather than as a petition to carry out the provisions of condition No. 24.¹⁰

10. Upon completion of litigation in the *Northern Lines* case and consummation of that merger, Milwaukee may wish to seek relief from the Commission in that proceeding to determine the relationship of condition No. 24, if any, to Peninsula's tracks which would at that time be partially owned by the *Northern Lines*.

The hearing examiner concluded that the entire Portland territory is an industrial transportation area which in considering the public interest can be treated only as one transportation terminal entity. He felt that "divisive determinations would result in multiple problems and prolonged litigation not conducive to the future welfare, growth and development of the Portland area." Therefore, he based his recommendations upon consideration of the involved area as a whole.

We cannot conclude, however, that the mere presence of SP, and the prospective presence of Milwaukee, in the general Portland area give them the right to serve all industries anywhere within that undefined geographical area. Cf. *Nashville, C. & St. L. Ry. Construction*, 295 I.C.C. 363, 377. If we were to adopt the hearing examiner's conclusion, we would be providing grounds for every railroad in the undefined Portland area to seek to serve the stations and industries of any or all other railroads. The resulting situation could well give rise to more problems and litigation and be more disruptive of growth and development of the area than the "divisive determinations" frowned upon by the hearing examiner. Therefore, we do not agree with his conclusion in this regard and for that reason we consider Peninsula, rather than the entire Portland area, to be the focus of our attention here in resolving the public interest factor.

Confining our consideration of the terminal area involved to Peninsula, we find that since neither SP nor Milwaukee now connect with Peninsula, and have never connected with it in the past, their direct service to Peninsula's industries over the objections of SP&S and UP would constitute a new operation and an invasion of the joint applicant's territory. In the past, the Commission has usually held that sound

economic conditions in the transportation industry require that a railroad now serving a particular territory should normally be accorded the right to transport all traffic therein which it can handle adequately, efficiently, and economically, before a new operation should be authorized. This conclusion is applicable not only with respect to existing traffic but also with respect to potential traffic and is generally also followed in proceedings involving motor carriers. See *Minneapolis, St. P. & S. S. M. R. Co. Acquisition*, 295 I.C.C. 787, 802, and cases cited therein.

As shown in the appendix, SP shared, through connections and use of joint rates and routes, in only about 20 percent of Peninsula's traffic during 1966, and only about 17 percent during 1967. Milwaukee's share, also via connections and joint rates and routes, amounted to only 1 percent during those years. Permitting SP and Milwaukee to acquire access to, and equal ownership of, Peninsula and therefore participate in its existing traffic on a direct haul basis will, of course, allow those two railroads to increase their share of Peninsula's declining traffic (3,640 loaded cars handled in 1966 and 2,748 handled in 1967). These increased shares of SP and Milwaukee could only be at the expense of the joint applicants and the railway employees whose jobs would be eliminated by the direct service planned by SP and Milwaukee.

Only three of the 13 shippers located on Peninsula's line participated in these proceedings and they support the joint applicants. Two of these three desire present service to continue. Three shippers, all located in Rivergate, support SP. At the time of the hearing, only one, Zellerbach, was in actual operation and it does not oppose the joint applicants. Its interest appears to be in obtaining the maximum

amount of direct service in order to increase its car supply. It also believes that four-way control of Peninsula would result in the elimination of a 22-degree curve in Peninsula's line thereby permitting the use of longer cars than are presently used for its poles. Its complaint with regard to present service is that 64 percent of its pole shipments during the period between December 1, 1966 and November 30, 1967, incurred an average delay of 4.5 days each because of car shortages. The joint applicants reply that the drop-end gondola cars, supplied by the railroads for the movement of Zellerbach's poles, are special-purpose cars, not always immediately available. The record does not warrant a finding that car supply to Zellerbach under four-railroad control would be increased or that there would be any greater likelihood of track realignment.

The steel mill supporting SP was in the process of construction at the time of the hearing. According to the record, it appears to have been located in Rivergate in order to take advantage of the available water transportation. Although it is interested in developing an ore field near SP's line in California, its Rivergate plant was constructed in an area where the round trip unit-train SP service, for which it states a preference, cannot be instituted without major fill and track construction. The record does not establish that under four-railroad control, the other three carriers would be willing for Peninsula to incur the expense of new construction for the sole benefit of SP. Likewise, the record fails to establish that the steel mill would not develop the California ore field if SP's unit-train service were unavailable because of the joint applicants' control of Peninsula.

The third shipper supporting SP is the chemical company, also under construction in Rivergate at the time of

the hearing. The record shows it was located in Rivergate through the efforts of SP&S. It also intends to utilize water transportation for its inbound raw materials and water, truck, and rail for its outbound product. Its support of SP is apparently based on the general supposition that the more rail service it has into its plant, the better such service will be. It offered no particulars as to the superiority of SP service and does not contend that its operations will in any way be hampered if direct SP service is not received. In our opinion, and we so find, the evidence offered by the three shippers supporting SP's position, as well as the evidence offered by the petitioners themselves, fails to establish that the joint applicants, through control of Peninsula, cannot handle present and future traffic in the Peninsula territory adequately, efficiently, and economically.

We have thoroughly considered the briefs and replies to exceptions filed by the public agencies participating in these proceedings. Like the individual shippers supporting SP, the public agencies are apparently motivated by a desire for the service of as many railroads as possible into Rivergate. However, this objective, if achieved at the expense of the joint applicants as proposed in the instant proceedings, would be directly contrary to the precept of the Congress, embodied in its national transportation policy, to foster sound economic conditions in the transportation industry. The adverse effect on SP&S and UP, and the shippers dependent upon them for service, of admitting SP and Milwaukee into ownership and control of Peninsula, would outweigh any advantage accruing to SP, Milwaukee, and the Rivergate industries of four-railroad ownership. We cannot find, therefore, that inclusion of SP and Milwaukee in the title proceeding would constitute a just and reasonable term, condition, or modification of the authority requested by the joint applicants.

Common use applications under section 3(5).—The intent of Congress in enacting section 3(5) was to provide a method of avoiding the necessity for incurring unnecessary expense in duplicating existing terminal facilities by a railroad entitled to serve a particular territory. Cf. *Use of Northern Pac. Tracks at Seattle by Great Northern*, 161 I.C.C. 699. For a more recent case, see *Seaboard Air Line R. Co.—Use of Terminal Facilities*, 327 I.C.C. 1, where one railroad was authorized to acquire common use of another's facilities in order to continue service to a port which had been removed to a new location.¹¹ In the instant case, SP is not entitled to serve Peninsula or Rivergate. Therefore, there is no question of avoiding costly construction from SP's present Portland terminus to Peninsula through the acquisition of the common use rights it requests. Accordingly, we find no ground for authorizing the requested common use.

Since we find that the common use authorizations requested by SP under section 3(5) of the act should not be authorized for the reasons stated above, we need not reach the questions of whether common use of the facilities involved would be practicable or would substantially impair the ability of Peninsula and UP to handle their own business. Other contentions of the parties as to fact or law, both with respect to the title proceeding and the common use applications of SP, not specifically discussed herein have been given consideration and found to be without material significance or not justified.

11. This case was cited by SP in support of an allegation that an invasion of territory may be accomplished by means of a section 3(5) authorization. Since the railroad acquiring the common use rights was actually serving the port involved, in the port's old location, and would continue to render the same service in the new location, there was no invasion of another railroad's territory and the cited case does not support SP's allegation.

Traffic conditions.—Although we find herein that joint control of Peninsula by SP&S and UP, through purchase of its capital stock, is in the public interest, Peninsula's present routings and interchanges should be maintained unchanged by the joint applicants. SP&S suggests that for this purpose it is willing to accept imposition of the so-called standard traffic conditions prescribed in *Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455, 492. We believe that with some modification, these conditions will adequately serve their intended purpose in this case. Therefore, to protect the present routings and interchanges, our order herein will impose, by reference, the following traffic conditions:

1. Under the control of SP&S and UP, Peninsula shall maintain and keep open all routes and channels of trade via existing junctions and gateways, unless and until otherwise authorized by the Commission;

2. The present neutrality of handling inbound and outbound traffic to and from Peninsula by SP&S and UP shall be continued so as to permit equal opportunity for service to and from all lines reaching Peninsula through SP&S and UP without discrimination as to routing or movement of traffic, and without discrimination in the arrangements of schedules or otherwise;

3. The present traffic and operating relationships existing between Peninsula, on the one hand, and, all lines reaching Peninsula through the lines of SP&S and UP, on the other, shall be continued insofar as such matters are within the control of SP&S and UP;

4. Peninsula, SP&S and/or UP shall accept, handle, and deliver all cars inbound, loaded and empty, without discrimination in promptness or frequency of service irrespective of destination or route of movement;

5. Peninsula, SP&S and/or UP shall not do anything to restrain or curtail the right of industries, now located on Peninsula, to route traffic over any and all existing routes and gateways;

6. Peninsula, SP&S and/or UP shall refrain from closing any existing route or channel of trade with SP or Milwaukee on account of the transaction authorized in Finance Docket No. 24679, unless and until authorized by this Commission;

7. Consummation of the transaction authorized in Finance Docket No. 24679, shall constitute assent by the corporate parents of SP&S, the members of their respective systems, and any carrier resulting from consummation of the Northern Lines case, to be bound by these conditions to the same extent that SP&S is bound by these conditions; and

8. Any party or person having an interest in the subject matter may at any future time make application for such modification of the above-stated conditions, or any of them, as may be required in the public interest, and jurisdiction will be retained to reopen the proceeding on our own motion for the same purpose.

Employee conditions.—The so-called *North Western* conditions recommended by the hearing examiner for the protection of railway employees are obsolete for transactions such as this and have not been imposed by the Commission for several years due to the uncertain protection they afford. In our opinion they are inadequate to protect the employees in this proceeding. It is our opinion, also, that the purchase of Peninsula's control by SP&S and UP will not affect employees to the extent that the attrition

conditions agreed upon by the carriers and employees in the *Northern Lines* case, and requested here by BLE, would be merited.

° Instead, we believe that the *New Orleans* conditions, requested in the alternative by BLE, will provide sufficient protection and our order herein will impose, by reference, the conditions prescribed in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271, for the benefit of railway employees of the joint applicants and Peninsula adversely affected by this transaction, subject, however, to the following arbitration provision in lieu of those now in the *New Orleans* conditions:

In the event any dispute arises with respect to the protection afforded by these conditions or with respect to their interpretation, application or enforcement, which cannot be settled by the carriers and the employee or his authorized representatives within 30 days after the dispute arises, it may be referred by either party to an arbitration committee for consideration and determination. Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the arbitration committee and the two members thus chosen shall select a third member who shall serve as chairman. Should the two members be unable to agree upon the appointment of the third member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a third, or neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate the third member, which designation when made will be binding upon the parties. The decision of the majority of the arbitration committee shall be final,

binding and conclusive. The salaries and expenses of the third member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

Inasmuch as the BLE's request for conditions to protect the North Portland Terminal employees is based on the contingency that SP and Milwaukee will participate in Peninsula's control, and since that contingency is precluded by our denial of the petitions and applications of those two carriers, there is no need to deal further with the matter, and the contingent request for the protective conditions is denied. Moreover there is no indication that the said employees come within the protective purview of section 5(2)(f).

ULTIMATE FINDINGS

The acquisition by the joint applicants of control of Peninsula does not involve any guaranty or assumption of the payment of dividends or fixed charges and will not result in any increase in total fixed charges. The petitions of SP and Milwaukee for inclusion therein have been considered and disposed of and no other railroad seeks to be included. Adequate transportation service to the public will not be affected and railway employees will be protected by the imposition of the conditions we have provided in their behalf.

Accordingly, we find in Finance Docket No. 24679 that, subject to the conditions imposed herein for the protection of railway employees and traffic, the acquisition by the Spokane, Portland and Seattle Railway Company and the Union Pacific Railroad Company of control of the Peninsula Terminal Company through the purchase of its entire capital stock in equal shares, as described herein, is a transaction within the scope of section 5(2) of the Interstate

Commerce Act, that the terms and conditions thereof are just and reasonable, that the transaction will be consistent with the public interest, and that the inclusion in the transaction of the Southern Pacific Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company is not, for the reasons discussed herein, consistent with the public interest.

We further find in Finance Dockets Nos. 24890 and 24891, that the common use by the Southern Pacific Company of the terminal facilities of the Peninsula Terminal Company and a line of railroad of the Union Pacific Railroad Company and bridge traffic rights over the latter line, all as described herein, is not in the public interest.

An appropriate order will be entered.

APPENDIX

Excerpts from the report of the hearing examiner

Peninsula is a terminal railroad Oregon corporation subject to part I of the Interstate Commerce Act engaged in switching operations at North Portland, Oreg. North Portland is within the Portland switching district. Portland is a major deep channel seaport, transportation, and distribution center serving the Pacific Northwest and the Continental United States. The western end of Peninsula's main line extends to a Crown Zellerbach pole yard * * * at the eastern tip of Rivergate Industrial District (Rivergate) * * * affording potential connection with a proposed Rivergate rail system and the impetus for unusual carrier, industry, and public interest in these proceedings. Peninsula owns no tracks within Rivergate. It serves the pole yard by using industrial tracks of Zellerbach there. Peninsula was established as an essential for operation of Portland

Union Stockyards * * * to facilitate handling livestock, and to provide a rail connection between the stockyards and trunkline railroads serving the Portland area. * * * Swift & Company presently processes only agricultural chemicals, hides, and wool at North Portland and the volume of that activity is expected to decline. Crown Zellerbach Corporation (Zellerbach) recently acquired the North Portland Swift property and expects to establish a 200,000-square foot warehouse and an ink manufacturing factory there. Zellerbach also has its Flexible Packaging Division plant at North Portland and operates the above-described pole yard at the west end of the Peninsula line in the Rivergate area. Peninsula serves 13 industries on its line other than the stockyard. * * * Peninsula has become less important to Portland Stockyards and * * * [United Stockyards Corporation (United), Peninsula's present owner] has no interest in operating a railroad independent of stockyard operations. It therefore proposes to sell all of the stock in Peninsula at a reasonable price established through a 1962 appraisal by American Appraisal Company and has no preference as to the purchaser. * * * The agreed purchase price of Peninsula under a contract of purchase dated February 28, 1967, between United and SP&S and UP is a total of \$299,405 for all outstanding shares of common stock of Peninsula plus a sum of \$70,000 to reimburse United for two switch engines sold by United to Peninsula representing an unsecured account payable to United. Settlement to be made by checks of purchasers upon approval of the transaction. The appraisal was based on empty land, plus local costs of roadway and structures, less depreciation. Adjustment of the appraisal, at the time of contract of sale was made only as to rolling stock, working capital, and miscellaneous betterments. The president of Peninsula represents that the contract price is fair and reasonable.

Peninsula properties consist of 13.17 acres of land, none suitable for industrial development, 15,559 feet of main-line track plus spurs and sidings or a total of 3.79 miles of main-line and secondary and spur track laid on treated ties in sand with no rock ballast. The distance from one end of the line to the other is about 8,000 feet with a 5-foot elevation to its eastern end. The above-noted two locomotives owned by Peninsula consist of a 50-ton G.E. electric, and the other, a 70-ton Copper Bessimer electric, including tools and parts for operation and maintenance. Tools for track maintenance, a conveyance for workmen, a heated enginehouse for both locomotives, a yard office (14 feet by 23 feet 6 inches in size), and a sand house (11 feet by 18 feet in size) are also owned.

* * * * *

Peninsula receives cars directly from and delivers cars to SP&S, NP, UP, and Great Northern Railway Company (GN) (empty and loaded) at North Portland, which total [from 10 to 20] * * * cars daily handled through the North Portland Freight Station with an office located at the Portland Stockyards. The cars move to or from double main-line tracks jointly owned by SP&S and NP, extending from Vancouver, Wash., south across the Columbia River, through North Portland and across the peninsula at the junction of the Columbia and Willamette Rivers (the peninsula) to SP&S Doan Street Yard and the Portland Terminal Company's Guild's Lake Yard. At North Portland there is, among other things, a head block on the SP&S-UP tracks and a 259.5-foot track extending therefrom to four North Portland interchange tracks * * * [3 of] which accommodate from 30 to 35 cars each. One is used by Peninsula for receipt of cars from the trunklines. The second is used by Union Pacific to receive cars from Peninsula, GN, NP, and SP&S. The third is used by SP&S, NP,

and GN to receive cars from Peninsula and UP, and the fourth is an open or running track. Two of the interchange tracks are owned, one-half by Peninsula, and one-half jointly by UP, SP&S, and NP. The other two tracks are owned jointly by UP, SP&S and NP. The interchange tracks connect directly with Peninsula's main-line track to the north and also with a single-line track of [the Oregon-Washington Railroad & Navigation Company] (OWR&N), * * * [a wholly owned UP subsidiary], extending about 1.7 miles southerly across tracks of UP to Peninsula Junction, and thence about 2.6 miles through a tunnel near St. Johns Junction to Albina Yard. The interchange tracks are used by Peninsula, UP, NP, and SP&S as joint owners, and by GN under a contractual arrangement. The use includes interchanges between the four trunklines and also between those lines and Peninsula. * * * Service at North Portland is provided through a joint local freight agent of the trunklines who informs Peninsula of industry service requested as to outbound moves. The agent prepares the inbound interchange reports and Peninsula the outbound interchange reports. Outbound bills of lading of the four trunklines are signed by the joint agent. Expenses of maintaining the North Portland station are prorated among the four lines by car count, loaded and empty, with the joint-facility invoice prepared by the operating road, UP or SP&S. The joint agent recommends no routings for shippers and receives no open-route car orders. Usually there are four deliveries and two pickups daily of cars moving to or from Peninsula by SP&S or UP. Cars from Peninsula could move by UP to the pass near Peninsula Junction, to Kenton Yard (about 2.6 miles southeast of Peninsula Junction) or to Albina Yard. Cars picked up from Peninsula by SP&S usually move to Vancouver. In addition to the

above-described North Portland Freight Station, there is a yard office at the eastern end of the interchange tracks. The yard office is maintained jointly by SP&S and UP under terms of a 1912 agreement which established the North Portland Freight Station. Four clerks at the yard office are UP employees and four clerks at the North Portland Freight Station are SP&S employees.

Peninsula also provides local intraplant and intraterminal service. It has established local switching tariff No. 23, effective September 23, 1965 (not applicable to rail line-haul service), which among other things provides a \$22.44 per-car charge for each car movement and service charges for the handling of livestock. No other switching tariff is published by it. Peninsula solicits no traffic and traces no shipments moving beyond its line. Revenue from its connecting rail carrier service is derived from a division of revenue, billed and collected by the trunkline, generally amounting to \$29.25 a car when the car revenue exceeds \$60. The agreed rate divisions were established by Joint Division Sheet 8-R issued by North Pacific Coast Freight Bureau, Seattle, Wash., effective July 1, 1964. Usually the line-haul carriers absorb the division charges. Its locomotives and crews operate two 8-hour shifts each day of the week, one from 9 a.m. to 5 p.m. and the other from 9 p.m. to 5 a.m. Light repairs of roadbed and equipment are made by regular Peninsula employees and heavy repairs by part-time employees. Since January 1, 1968, by agreement with Portland Livestock, Peninsula employees load and unload livestock.

Basic labor agreements were entered into by Peninsula on April 14, 1943, with the Brotherhood of Railroad Trainmen and on June 15, 1941 (since modified), with the Brotherhood of Locomotive Firemen and Engineers. Peninsula engineers are paid \$29.05 or \$32.68 a day for service ex-

clusive of repairs and maintenance with no holidays. They receive vacation and insurance benefits equivalent to employees of trunkline carriers. Switchmen receive \$27.88 a day and the footboard yardmaster \$30.21 with seven annual holidays, extra pay for work on holidays, and vacation, insurance and welfare benefits similar to the engineers'.

United has agreed to manage Peninsula after the purchase in accordance with policies of its director, including supervisory, accounting, stenographic and other necessary managerial services as presently provided. United may terminate the agreement on 6 months' notice and the purchasers may terminate it on 30 days' notice.

During 1960, Peninsula handled 4,993 loaded or partially loaded cars compared to 2,748 cars in 1967. The latter represents about 39 percent of all cars interchanged at North Portland. The other 4,300 cars were interchanged between SP&S, NP, and GN, on the one hand, and, on the other, UP. From 1960 through 1967, there was a decrease in movements of livestock and packinghouse products and an increase in wood products. For example, in 1967, 34 percent of the cars handled transported wood products, 33 percent chemicals, 8 percent livestock, 7 percent packinghouse products, 13 percent paper products, and 5 percent other. In 1960, 16 percent of the cars handled wood products, 8 percent chemicals, 48 percent livestock, 15 percent packinghouse products, 6 percent paper products, and 7 percent other.

The statement of assets and liabilities of Peninsula as of February 1967, reveals total assets \$239,716, including current assets \$35,038 (cash on hand, \$17,365, accounts receivable, \$7,888, materials and supplies, \$8,669, and prepayments of insurance and other, \$1,116), properties—transportation road and equipment, less depreciation,

\$196,938, and miscellaneous physical property, \$7,740. Its expense and retained income statement for each of the calendar years, 1962 through 1966, and for February 1967, reveals, among other things, total railway operating expenses for February 1967, \$14,774 and for 1966, \$81,244, total income before fixed charges for February 1967, a minus (\$725) and for 1966, \$13,320 less miscellaneous rents paid, \$1. Rent for leased road equipment for 1966, was \$3,200 and for January 1967, \$533. The balance of retained income for February 1967, was \$7,504 and for 1966, \$8,762. At the beginning of 1962, its retained income was \$151,208, which by the end of February 1967, was reduced to \$7,504, after adding annual income (less losses), and subtracting dividends of \$167,556 paid during 1966.

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SP&S operates over lines generally extending from Spokane through Pasco along the north side of the Columbia River to Vancouver, Wash., thence across the Columbia River through North Portland, thence across the east-west line of UP on the peninsula, and thence across the Willamette River, through Doane Lake Yard and Willbridge, Oreg., to Guild's Lake Yard. The latter connects with Portland Terminal Company tracks in downtown Portland. A connecting track at the intersection of SP&S and UP lines on the peninsula affords access to Barnes Yard. SP&S has trackage rights at Barnes Yard and at Terminal No. 4. UP and SP&S jointly own tracks extending from Barnes yard to the southwestern side of Rivergate which connect there with those of the Port of Portland. The SP&S Vancouver-Willbridge track, constructed in about 1908 with an industrial spur at North Portland, is jointly owned by SP&S and NP. In 1909 * * * [OWR&N] constructed a track connecting Albina with the spur track, and a year later

built a bypass track at the North Portland Junction. The bypass enables operation between Albina and North Portland interchange tracks without entering the SP&S-NP main line. * * * Additionally, SP&S owns Oregon Trunk Railroad extending from Wishram, Wash., a point on the SP&S line, to Bend, Oreg., and also owns Oregon Electric Railway Co., extending south from Portland to Eugene, Oreg. SP&S directly serves industries on its lines and those on lines used jointly by it located on the southwest side of the Willamette River at Portland including industries and docks also served by Portland Terminal Company. It serves industries at East Portland by use of the UP-SP steel bridge across the Willamette River near the Portland Terminal Company's depot and yard. SP&S switches cars to and from points in the East St. Johns and the Terminal No. 4 areas north of the Willamette River and south of Rivergate. SP&S delivers cars daily to the North Portland interchange tracks at 2:30 a.m. and 11 a.m. and picks up cars there at 9:30 a.m. and 6 p.m. UP also picks up and delivers cars there daily at 6:30 a.m. and 2:30 p.m. * * * North Portland line-haul traffic of NP and GN is usually moved twice daily to and from Vancouver. SP&S switches all Vancouver cars including those of UP. SP&S assesses a tariff switching charge for movement of cars to and from Peninsula interchange. * * * SP&S as owner of Peninsula could obtain Peninsula trackage rights which are essential to any agreement for switching operations. Presently Milwaukee could interchange cars with SP&S * * * for movement to the peninsula by payment of a division of the through rate. In the absence of Milwaukee trackage rights there the receiving carrier could designate car delivery points of Milwaukee cars. * * *

SP&S indicates that the extension of Peninsula to serve the Rivergate is uncertain because of heavy curvature, impaired clearances, and low standard tracks of Peninsula,

but alteration will become necessary with growth of the district; that a new direct access track from the SP&S main line at North Portland may be feasible; and that if such a track is constructed SP&S and UP have assured the Port of Portland they would provide service similar to that now available in the southwest part of the district. SP&S has made no decision respecting the planned additional access route to Rivergate. It expects to provide adequate switching service into the area as required.

* * * * *

The SP&S parent companies' ownership is in issue in [the *Northern Lines* case] *** Pursuant to proposals therein, on October 26, 1966, Milwaukee entered into a written agreement with GN, NP, Chicago, Burlington & Quincy Railway, SP&S, and the New Company (The Great Northern Pacific & Burlington Line, Inc.), which as pertinent provides:

Effective upon the consummation of the consolidation proposed in Finance Nos. 21478, et al., the Milwaukee shall receive all of the six (6) conditions as sought by it in the aforesaid proceedings, as follows:

Condition No. 2—Entry into Portland and Trackage Rights between Longview Junction and Portland.

Provisions of the agreement relating to implementation of condition No. 2 require the New Company, or of SP&S, where possible, to grant Milwaukee trackage rights over present NP and SP&S tracks between Longview Junction and Portland, including the right to serve on an equal basis all present and future industries at Portland and intermediate points and the use of New Company facilities at Portland necessary for the switching of traffic to other railroads and industries. There is no specific reference therein to North Portland, or use of the North Portland interchange tracks.

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UP, a class I railroad corporation, operates over trackage extending (1) from Seattle to Portland, (2) from Portland, through O.T. Junction and Hinkle, Oreg., Pocatello, Idaho, and Cheyenne, Wyo., to Omaha, Nebr., (3) from Cheyenne, through Denver, Colo., to Kansas City, Mo., (4) from Spokane, Wash., to Hinkle, (5) from O. T. Junction, Oreg., to Bend, Oreg., and (6) from Pocatello to Los Angeles, Calif. UP connects at Bend with GN. *** UP tracks enter Portland from the east forming a great loop extending from a wye near Troutdale, 14 miles east of the Willamette River at Portland. One track extends from Troutdale generally west parallel with the Columbia River through Kenton Yard, Peninsula Junction, across the SP&S-NP tracks which enter Portland from the north, thence through Barnes Yard to the southwestern side of Rivergate and Terminal No. 4, and returns along the north side of the Willamette River through St. Johns Junction located in Swan Island Industrial Park, through Albina past the entrance of the steel bridge (which affords access to the Portland Terminal Company's yard and depot in downtown Portland) to East Portland (junction with SP), thence generally east through Sullivan Gulch to Troutdale. Track at the west end of the loop near Barnes Yard jointly owned by SP&S connects with Rivergate where UP has served Ash Grove Lime and Cement Company. An OWR&N *** track segment extends from North Portland interchange tracks, through St. Johns Junction, and Albina Yard to East Portland. This *** main track, was mentioned in connection with SP&S tracks. It crosses the western end of the UP loop as does the SP&S-NP tracks west thereof. This segment of track is of particular significance in these proceedings. SP traffic now moves or is expected to move over it. An issue respecting congestion of traffic on the track segment is raised by UP in its opposition to the SP proposals. The distance over the segment from

North Portland interchange tracks to the north end of Albina Yard is 5.2 miles. From the connection of the North Portland interchange tracks with Peninsula over the OWR&N tracks to its intersection with the UP track at Peninsula Junction is about 2.04 miles. At this intersection connections permit switching in four directions. Operation over the turnouts there is limited to 15 miles per hour. Near this intersection UP also has a bypass track which will accommodate about 10 cars. The distance from Peninsula Junction over the segment south through a 1-mile tunnel to St. Johns Junction is about 2.16 miles and the distance beyond St. Johns Junction over the segment to the north end of Albina Yard is 1.02 miles. The track segment generally is level with the exception of the 5/10 of 1-percent grade increase from Albina Yard to the center of the tunnel. There is only one significant highway grade crossing on the segment at Columbia Boulevard which has a flashing light signal. There are also two or three private grade crossings near Peninsula Junction. Between Albina Yard and North Portland there is a 131-pound single-line track laid on rock ballast having no curves which create operating problems. Operation over the segment of track between Peninsula Junction and Albina Yard is presently controlled by a central traffic control system from Albina Yard. Albina Yard is a large and important classification and transfer yard of UP including about 44 tracks which will accommodate from 15 to 20 cars each extending about $\frac{3}{4}$ of a mile in length. The Willamette River lies along the western side of the yard and a super highway and a bluff lie along its eastern side limiting expansion. However, a map in evidence reveals that the yard at its center is about 500 yards wide and near its south end 666 yards wide. Most UP traffic to or from the Portland area moves through this yard. There is a 400 by 150-foot freight house at the south end of the yard. This is

used in part as a salvage depot by UP and in part by shipper lessees. All of the tracks are used for switching purposes by UP. It endeavors to keep open one or two of the center tracks in the yard to accommodate through traffic. None of the tracks are permanently designated as running tracks although a substantial amount of through traffic moves through the yard. UP operations at Albina Yard are represented as taxed to capacity, with no room for expansion there. Switch engines operate out of there to serve Kenton Yard, North Portland Barnes Yard, East Portland, Sullivan Gulch, and Portland Terminal Company. They move, in addition to freight, passenger trains to and from Portland Station. Two such trains operate each way daily through Sullivan Gulch. Other passenger trains moved by engines from Albina operate out of Portland Station over the SP&S main line through North Portland and not through Albina Yard. Five UP freight trains operate each way daily over the track segment between Albina Yard and North Portland Junction. Delays at North Point Junction interlocker are not uncommon with some delays as long as 80 minutes. SP uses the track between Brooklyn Yard and Albina Yard for freight moving to and from North Portland. The speed of traffic through the interlocker at East Portland is limited to 8 miles an hour. SP proposes to handle cars from Brooklyn to North Portland. UP represents that if the SP applications are granted congestion would occur principally on the single-track segment between St. Johns Junction and Peninsula Junction; that three-fourths of the UP trains arriving at Albina Yard via Kenton are delayed from 15 to 180 minutes because of Albina Yard congestion. Also, there is a 1.2-percent grade on the UP track 1 mile east of East Portland which tends to retard car movements. Usually engines stationed at Kenton Yard are used for switching

between Albina Yard and North Portland. There has been a consolidation of the Kenton Yard and Terminal No. 4 engines to eliminate congestion of traffic. There were about 40 to 56 switching [transfer and train] moves daily in the Peninsula Junction area during 1967. For example, an average of 40 *** [switch transfer or train moves] a day moved between October 1 through October 14, 1967, and an average of 37 *** [switch, transfer or train moves] a day between January 14 through 27, 1967. From January 26 through January 27, and from October 1 through October 14, 1967, traffic clearances in excess of 30 minutes between Albina Yard and North Portland interchange occurred from about 4 to 11 times or an average of 7.5 times daily. There are four transfer SP trains handled daily at Albina Yard. About 6 UP trains move each way in addition to trains of NP, GN, and SP&S over tracks north of North Portland or a total of about 55 trains daily use those tracks. About 30 minutes time should be required to operate a switch engine with a few cars over the cleared track segment between North Portland and Albina Yard. However, an average of about 30 hours has been required for the movement of SP cars and also those of UP between Albina Yard and North Portland. UP does not consider a 30-hour transit time adequate service and has endeavored to reduce the running time by the described consolidation of its Kenton-Terminal No. 4 terminal service, by the establishment of the above-described central traffic control, by breaking trains at Seattle, Dow, Hinkle, and Pocatello to avoid switching at Albina Yard, and by increased operation through Sullivan Gulch.

There is a double track extending from the south end of Albina Yard to East Portland and the junction of the SP there. Even though traffic congestion exists at Albina Yard,

UP nevertheless represents that it can provide Rivergate any service through Peninsula needed and represents that its present service in the involved area meets shippers' demands for service. The steel bridge crossing the Willamette River at East Portland is jointly owned by SP and UP. The bridge, as noted, allows UP and SP to connect with the tracks of the Portland Terminal Company, the Portland Yard, the SP&S Hoyt Street Yard, and the SP&S and NP Guild's Lake Yard, which permits SP to interchange traffic at the latter yard with SP&S or NP. Portland Terminal Company is a terminal switching company owned 40 percent by UP, 40 percent by NP, and 20 percent by SP.

UP, as noted, physically connects with Peninsula at North Portland, an interchange junction point and station on GN, NP, SP&S, and UP, within the Portland switching district. The physical interchange of line-haul traffic moving by UP or its connections is performed by UP. On traffic moving to and from SP via SP&S, NP, GN, and UP from and to industries located on Peninsula, SP absorbs the Peninsula's rate division, and on traffic in which Milwaukee participates through joint routings, no switching charges are passed on to the shipper or consignee. UP expects to continue its policy of permitting line-haul carriers having no physical interchange with Peninsula to reach, through existing joint rates and routes, industries on the latter's line.

At the request of the Port and the Commissioner of Public Docks, a railroad conference was held at Portland on June 20, 1967, to consider elimination of noncompetitive switching charges to or from industries located on the Port's property at Swan Island (Albina) and Rivergate to encourage industrial development there. Thereafter, railroads participating in the conference agreed to establish

a single basis of switching charges at all common points within Northern Idaho, Washington, and Oregon, with switching charges to be absorbed by the line-haul carriers where the line-haul minimum revenue is \$100 a car after absorption, and no absorption of switching charges when specific tariff rate items are excluded. UP represents that when the agreement is implemented all industries within the Portland switching district including the Port's property area served by Peninsula, and points in North Pacific Coast territory will be on a competitive relationship except for the two conditions noted.

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SP, a class I railroad, operates over trackage generally extending (1) from Portland south through Eugene and Klamath Falls, Oreg., Sacramento, San Francisco, and Los Angeles, Calif., Phoenix and Tucson, Ariz., El Paso and Houston, Tex., to New Orleans, La., (2) from San Francisco through Sacramento, Calif., Reno, Fernley, Weso, and Alazon, Nev., to Ogden, Utah, and (3) from Fernley to Klamath Falls. Service over these tracks is rendered by SP at many points south and east of Portland in Oregon, California, Nevada, Utah, Arizona, New Mexico, Texas, and Louisiana. At Portland, the northern terminus of SP tracks, as noted, connects with those of UP at an interlocking plant about 375 feet south of the eastern end of the UP-SP steel bridge across the Willamette River at Portland. SP maintains a large switching yard at Brooklyn known as the Brooklyn Yard about 2.6 miles south of the interlocker. Trains moving into Portland from the south over SP lines are generally sorted and blocked at Eugene, Oreg., about 125 miles south of Portland and move to Brooklyn Yard for further blocking if required before they are received by UP at East Portland. SP traffic to or from Peninsula moves principally over UP tracks from East

Portland through Albina Yard, St. Johns Junction to the North Portland interchange tracks. In some instances SP traffic also moves from East Portland across the steel bridge to the Portland Terminal Company yard, thence to Hoyt Street Yard for interchange with SP&S and movement over the SP&S main-line tracks to North Portland interchange. The distance from Brooklyn over the UP tracks to Peninsula is about 8.59 miles. An SP engine and crew is used to move cars from Brooklyn through East Portland, thence over the UP tracks to Albina Yard where they are received by UP for movement to Peninsula. The switch engine and crew of SP performs service from North Portland to Albina Yard as UP's agent. Similarly an SP switch engine and crew moves cars from Brooklyn over the alternate SP&S route to North Portland by operating as far as the Portland Terminal Company's yard where they are received by Portland Terminal Company, as an agent for the latter company. SP represents that if it is granted bridge trackage from the interlocker at East Portland to Peninsula at North Portland interchange tracks its engines and crews can operate from Brooklyn to North Portland. About 2 hours switching time would be required for a SP engine and crew to operate between Brooklyn and Albina Yard and an additional 1.5 hours between North Portland and Albina Yard or a total of about 3.5 hours and 30 minutes.

There are delays in the movement of traffic over the UP tracks between those points. A 10-percent random sample consisting of 42 cars (from a total of 410 cars) of SP traffic switched to and from Peninsula during 1967 in evidence reveals, among other things, an average of 32 hours and 10 minutes required for car movements from the SP interchange points to Peninsula when switched by UP or SP&S and an average of 55 hours and 16 minutes when

moved from Peninsula to the SP interchange point. SP represents that 30 hours or more required for the movement of cars between Albina and North Portland interchange is excessive and that SP with bridge rights can provide faster service. From 25 to 57 trains, or an average of 40, move over the UP tracks between Albina Yard and North Portland each 24 hours. SP anticipates no operating difficulties or labor complication in connection with its proposed operation over the described UP North Portland-Brooklyn Yard tracks. During 1967 about 490 cars were moved between Brooklyn Yard and North Portland interchange tracks over the described routes. It further represents that the proposed operation of unit trains of iron ore over the described UP tracks to and from Peninsula is feasible.

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Milwaukee, a class I railroad, operates over main lines from Seymour, Ind., through Chicago, Ill., Minneapolis, Minn., Seattle and Tacoma, Wash., to Longview, Wash., a point on the Columbia River about 46 miles from Portland. Its main lines also extend from Chicago to Council Bluffs, Iowa, and to Kansas City, Mo. It serves the grain producing areas in Montana and eastern Washington and provides a connecting carrier service from those points to Portland. It also serves much of the forest products producing area in Idaho and Washington and industries in Tacoma, Seattle, Everett, and Bellingham, Wash., north of Portland. Also, service is rendered at the industrial cities, among others, of Chicago, Milwaukee, St. Paul, Minneapolis, Omaha, Kansas City, Davenport, Rock Island, Moline, and Bettendorf. At the time of hearing it performed no physical operations to and from the Portland area and was awaiting final disposition and consummation in . . . [of the *Northern Lines* case]. If the Milwaukee petition herein for inclusion is authorized it expects to operate fast trains between Chicago,

Seattle, and Portland and between Portland and Sumas, Wash., with connection at the latter point with British Columbia railroads. However, such service cannot be established if terminal delays occur at Portland which offset the proposed service advantages. Its proposed service at Portland includes physical operation of its equipment to and from the Peninsula interchange tracks at North Portland. All the industries on Peninsula would be served as on-line industries with no absorption of switching charges. Despite postponement of the effective date of consummation in the *Northern Lines* merger case pending consideration of various petitions, Milwaukee expects the merger will be confirmed and consummated within a reasonable time, and contingent upon its extension of operations to Portland, requests joint and equal ownership of Peninsula stock with other trunklines and proposes to assume its share of the portion of the stock and indebtedness as set forth in the application. Its joint ownership is considered essential to its Portland operation to industries located on Peninsula and at Rivergate. Peninsula is the only terminal facility at Portland not owned by trunklines presently serving that point.

Milwaukee has a centralized, computerized expedited service for tracing, reconsignment, and diversion of cars and for the elimination of car delays. It owns 39,000 freight cars and in 1967 it transported 61,140 trailers in its trailer-on-flatcar (TOFC) service. It maintains facilities at various points for the loading and unloading of this type of traffic. Since 1963 it has maintained a 55.5-hour schedule service from Chicago to Seattle and 67.25-hour return. * * *

Milwaukee is not owned or controlled by any other railroad and does not own or control any other parties to the instant proceedings directly or indirectly. Its officials and directors have no common interest in such parties to this

proceeding. Milwaukee does own an interest in a number of other transportation companies not particularly pertinent to these proceedings.

INTERVENERS' EVIDENCE

The Port's position is that Rivergate's development requires services of all the involved line-haul rail, barge, and ocean vessel carriers serving Portland with service at competitive rates, and that all the rail applicants should be afforded equal operating access to Rivergate. It expresses a need for fast reliable freight service at Rivergate through Peninsula provided on equal terms by all present and future railroads serving Portland which can be accomplished by joint ownership. The Port desires the services of all the railroads to facilitate to mechanized rapid handling of liquid and dry bulk commodities, containerized commodities, and other general freight between Rivergate and points throughout the United States. It asserts that singlecar switching to and from small industries with so-called one-car sidings has become obsolete. Such switching is uneconomical because of engine and crew costs, and obsolete because trucks can more effectively perform a small shipment service.

The western district class I railroads traffic increased 36.2 percent in the 9 years following 1958. The Port's transportation consultant estimates that by 1990 traffic of those railroads will double, if adequate rail facilities are provided, and that Portland would share in its growth. Adequate facilities would include the most efficient mechanically fitted freight handling terminal with low freight handling costs possible through greater movement of intermodal traffic. After Rivergate's development, the Port estimates that from 500 to 600 cars or an average of 20,000 tons daily will move to and from the district; that daily service will

require 1 unit train, 1 semiunit train, 1 semiunit TOFC train, 2 industry trains, and 2 switching runs, and that the types of service would include provision for (1) bulk commodity unit trains (never uncoupled), (2) semiunit-train service for handling the less mechanized traffic to move in blocks of 40 to 150 cars; (3) TOFC service, and (4) miscellaneous and switching service. Rivergate is represented as affording opportunity for use of new technology in rail terminal service by use of unit and semiunit trains, and the elimination of lost car movement time usually incurred at terminals. UP and SP&S, as noted, are the only carriers presently having direct access to Rivergate through the eastern and western entrances. The Port indicates that, unless the four applicant railroads are afforded equal access to Peninsula its owners would create unsatisfactory non-single-line switching conditions for the other lines; that unit-train bulk traffic is impeded equally as much by switching delays as by traffic interchanges; that if Milwaukee traffic is switched by SP&S or UP before reaching Peninsula, Milwaukee's single-line efficiency to and from points in such States as Indiana and Iowa will be impaired; that if SP traffic is similarly switched, its single-line advantage to and from such points as Medford, Reno, Stockton, San Francisco, Fresno, Phoenix, El Paso, New Orleans, and Memphis will be limited. The Port represents that existing uncorrelated transfer of freight cars within the Portland switching district will not meet Rivergate's rail service needs; that uncoordinated switching operations at Portland result in a minimum 24-hour transfer time, and sometimes 3 or 4 days for operations across the switching district compared to a few hours required for cross-city truck movements. Peninsula assertedly will be useful to Rivergate only if it can handle unit trains of 100 cars or more which Peninsula's track facilities presently will not accommodate.

Economic and statistical evidence relating to Rivergate presented by the Port's Research and Planning Department reveals, among other things, the following: The Columbia-Willamette system is the second largest river improvement project in the United States. The Federal Government and the Port together, up to December 31, 1967, expended \$120 million in improving the system. Ultimate public and private investment at Rivergate is expected to exceed \$500 million. The Research and Planning Department is responsible for obtaining the described D.M.-J.M. commercial engineering Rivergate survey, report, and recommendations. The Port's long experience in marketing and research and its recognition of current technological transportation changes influenced its support of joint ownership of Peninsula by all the line-haul railroads serving Portland. The value of waterborne imports and exports in the Portland Custom District increased 313 percent from 1954 to 1966, compared to increases during that time of 201 percent at Los Angeles, 128 percent at San Francisco, and 132 percent at Washington ports. The Portland oceanborne traffic increased from 8,535,686 short tons in 1955 to 10,489,989 tons in 1965, or 22.9 percent.

The Portland Commission of Public Docks, City of Portland, favors joint ownership and operation of Peninsula and direct access to Rivergate by all line-haul railroads serving Portland. It is particularly interested in the transportation cost to shippers for movements to and from Rivergate, and asserts that noncompetitive transportation costs there would preclude consideration by industries of Rivergate as an industrial site. The Commission represents that establishment of a \$100 per car line-haul revenue minimum as proposed in the Conference of Railroad Presidents June 20, 1967, agreement to establish a single-basis switching charge at competing Pacific Northwest points would

adversely affect Rivergate shippers' interest without equal ownership by all the line-haul railroads in Peninsula. Railroads with no such interest for economic reasons would be required to assess switching charges, while owner-carriers subject to their own tariff provisions could absorb switching costs on the basis of a lower applicable car minimum revenue. Numerous illustrations of instances in which this might occur are in evidence. For example, a nonowner carrier subject to the P.C.F.B. tariff No. 35, I.C.C. 1098, item 685, naming a rate on cans, fibreboard, set up, of 40.5 cents a hundredweight, 14,000-pound minimum weight, from Portland to Banks, Oreg., representing a minimum-car revenue of \$84.70 would be required to assess an additional charge while an owner-carrier would absorb such a charge. Also, pointed out is the second exception to the proposed switching agreement which provides that switching charges will not be absorbed in instances where excluded by specific tariff provision.

The Public Utility Commissioner of Oregon, favors joint ownership of Peninsula by all line-haul carriers serving Portland. Evidence presented by the Commissioner covers geographical and physical characteristics of the involved transportation area. It reveals, among other things, that in addition to the five major railroads, NP, GN, SP&S, UP, and SP. presently serving the Portland area, 275 motor carriers operate to, from, or within Portland. Fifty-one of these carriers are regular-route general-commodity carriers all authorized to serve Rivergate within the Portland commercial zone. Tables in evidence presented by the Commissioner show that the annual operating revenue of Peninsula has ranged from a high of \$161,292 in 1956 to a low of \$75,949 in 1963. Its average revenue per car for switching

service increased from \$7.93 in 1950 to \$27.71 in 1966. Peninsula's net operating income has ranged from \$39,253 in 1955 to a deficit of \$4,153 in 1962. While it operated at a deficit in 1962 and 1963, its income has since considerably improved. The commissioner represents that the future need of Peninsula is closely related to development of Rivergate and the granting to SP and Milwaukee of direct access to Peninsula would provide present and future industries served by Peninsula direct service by all line-haul railroads serving Portland.

Through rates and charges of SP&S, GN, NP, and UP are presently applicable to industries served by Peninsula. SP does not interchange traffic at Peninsula and depends upon SP&S or UP switching service between the SP interchange at Portland (Union Station) or East Portland and the North Portland interchange. SP presently absorbs the switching charges on traffic moved to or from Peninsula subject to a per-car minimum charge of \$67 plus increases. Peninsula industries pay UP or SP&S for switching between North Portland and East Portland when the published through rates do not provide for absorption of the switching charges. For example, a switching charge is applicable to noncompetitive traffic originated by SP in Oregon moving to Peninsula.

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Zellerbach, the second largest producer of paper and paper articles in the United States and also a producer of industrial chemicals, has its principal manufacturing and shipping facilities located in the Portland area. It also has paper mills at Camas, Wash., and Wauna and West Lind, Oreg. It ships in excess of 1,100 carloads of the described commodities each month from the Portland area to

various points throughout the United States. Zellerbach has or expects to establish four facilities in the Portland area. One is a distribution complex, Water Way Terminal Company, served by the Portland Terminal Company and Western Transportation. The latter is a certified water carrier owned by Zellerbach which has connections with a number of other carriers. At the time of hearing, Water Way Terminal Company facilities were being expanded and Zellerbach was negotiating for the purchase of a 1,500-waterfront property located adjacent to Ashgrove Lime Company at the western end of Rivergate. The second is a pole yard located on 40 acres of land owned by Zellerbach at the eastern end of Rivergate. The pole yard, as noted, is served by Peninsula. The third facility is the planned construction of a 200,000-square foot warehouse to be located on 44 acres of land purchased from Swift & Co. At the time of hearing the land purchase was waiting escrow clearance. The land is about 500 yards east of the SP&S main line at North Portland. The warehouse is expected to be used for the storing and distribution of products of the adjacent Zellerbach Flexible Packaging Division plant, the fourth facility.

During the 12 months ending November 30, 1967, 365 freight cars moved to or from the Flexible Packaging Division plant and 638 freight cars (177 shipments) to and from the pole yard. The shipper's poles now move in 65-foot drop-end gondola cars supplied by the rail carriers. Sixty-four percent of the 177 pole shipments involved delays due to Zellerbach's inability to obtain suitable cars when needed. The delays ranged from 1 to 26 days, or an average of 4.5 days each.

Zellerbach supports each of the applications and petitions because authorization of the proposals would increase the number of carriers having direct access to Peninsula and increase its ability to obtain suitable cars, and because it desires service at its Rivergate facilities comparable to other transportation at Portland. It represents that such access could result in the elimination of a 22-degree curve in the present Peninsula tracks so that 85-foot pole cars can be accommodated thereon. Zellerbach represents that if SP had direct access to its pole yard, it would request that carrier's service more often. The Zellerbach representative could recall no instances in which it paid separate switching charges for service to and from its facilities located on Peninsula. Zellerbach indicates that the greater the number of connecting carriers required for handling a shipment the greater the number of rate divisions and cost of service.

Oregon Steel Mills, a division of Gilmore Steel Corporation of San Francisco, within the past 2 years has acquired 152 acres of Rivergate land where it is presently erecting a new steel plate mill. Several phases of construction of the mill are contemplated. The first phase cost is \$35 million. Upon completion of the first phase mill, it will produce 200,000 tons of steel plate annually and upon completion of the entire mill the ultimate mill's capacity will be 700,000 tons. The mill site was located ~~at~~ Rivergate because it affords room for the mill's expansion and for the location of related steel fabricating industries near it and because Rivergate is considered by this shipper as a transportation hub. There are presently steel plate mills located at Provo, Utah, and Fontana, Calif. The Rivergate mill will be the first producing steel plate mill located in the Pacific North-

west and its location will result in the establishment of a steel basing point at Portland, whereas up to this time the steel basing points have been at Provo and Fontana. Ore for use at the mill presently will be provided by Marconi Company transported by water carrier from Peru to Rivergate. However, Gilmore Steel Corporation owns large iron ore deposits near Mount Shasta, Calif., near a line of the SP. Arrangements are in progress for procuring iron ore at the Shasta location. Oregon Steel Mills expects to ship unit trains of ore from Shasta to the Rivergate mill and has obtained assistance and information respecting proposed transportation costs from SP, which in turn procured proposed costs of switching at Portland from UP. SP, prior to the filing of its applications, proposed to transport the shipper's ore from Shasta to the UP Portland interchange in SP equipment, including all terminal service charges at Shasta at \$3.85 a gross ton subject to a tariff docketing proposal, and information received from SP respecting the proposed UP switching costs which was confirmed through the UP rate department was \$0.23 a gross ton from the UP-SP interchange at Portland to Rivergate. Oregon Steel Mills prefers a single train crew and through round trip unit-train service. UP indicates it cannot provide this type of service at Portland because union contracts require the use of local power equipment and the payment of the Portland crew for a minimum worktime. The shipper represents that it would start mining ore at Shasta as soon as economically feasible, that its ore can move economically only in unit trains in the service of a single carrier with no connections and that it supports the SP applications to enable direct access to its Rivergate plant by SP through North Portland. The shipper is aware that major fill and track construction would be necessary before operation from Shasta through

North Portland becomes possible. It indicates that Rivergate is being developed by use of public tax money and it believes direct access to Rivergate should be afforded through all rail carriers.

Collier Carbon & Chemical Corporation, a Union Oil Company subsidiary, is constructing a new \$2 million distribution facility north of the Ashroyer Lime Company plant on the western side of Rivergate. The plant, to be in operation by the Fall of 1968, expects to use the direct service of SP, among other rail carriers, for the movement of its products from Rivergate. Urea, used in the manufacture of resins and fertilizer and as a cattle feed ingredient, is to be shipped by water carriers to the facility and to be re-shipped by rail, truck, and water carriers to its customers. It is particularly interested in obtaining SP service for movements to western Oregon points and supports the SP applications because direct SP service would provide it suitable transportation to western Oregon points within provision of reasonable transit time, car availability, and rates. It has no preference as to the carrier switching its traffic to a belt-line or terminal company.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 6th day of June 1969.

Finance Docket No. 24679

SPOKANE, PORTLAND & SEATTLE RAILWAY
COMPANY AND UNION PACIFIC RAILROAD
COMPANY—CONTROL—PENINSULA TERMINAL
COMPANY

Finance Docket No. 24890

SOUTHERN PACIFIC CO.—COMMON USE OF
TERMINAL FACILITIES—PENINSULA
TERMINAL CO.

Finance Docket No. 24891

SOUTHERN PACIFIC CO.—COMMON USE OF
CERTAIN TERMINAL FACILITIES—UNION
PACIFIC RAILROAD CO.

Investigation of the matters and things involved in these proceedings having been made, a hearing having been held, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That, in Finance Docket No. 24679, subject to the conditions referred to in said report, acquisition by the Spokane, Portland and Seattle Railway Company and the Union Pacific Railroad Company of control of the Peninsula Terminal Company through the purchase of its capital stock, as described in said report and under the terms and conditions found therein to be just and reasonable, be, and it is hereby, approved and authorized;

It is further ordered, That the petitions of the Southern Pacific Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company for inclusion in the transaction approved and authorized above in Finance Docket No. 24679, as described in said report, be, and they are hereby, denied;

It is further ordered, That in Finance Dockets Nos: 24890 and 24891, the applications of the Southern Pacific Company for common use of the facilities of the Peninsula Terminal Company and of certain trackage of the Union Pacific Railroad Company as described in said report, be, and they are hereby, denied; and.

It is further ordered, That this order shall take effect and be in force from and after 35 days from the date of its service; that if the authority granted in Finance Docket No. 24679 is not exercised within 180 days from said effective date, this order shall be of no further force or effect; and that if the authority granted in Finance Docket No. 24679 is consummated, the applicants therein shall confirm in writing to this Commission, immediately thereafter, the date on which consummation has actually taken place.

By the Commission, division 3.

H. NEIL GARSON,
Secretary.

(SEAL)

Appendix C

SERVICE DATE
OCTOBER 31, 1969

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 24th day of October, 1969.

Finance Docket No. 24679¹

SPOKANE, PORTLAND & SEATTLE RAILWAY
COMPANY AND UNION PACIFIC RAILROAD
COMPANY—CONTROL—PENINSULA
TERMINAL COMPANY

Upon consideration of the record in the above-entitled proceeding, of the petitions of Southern Pacific Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, The Port of Portland, The Public Utility Commissioner of Oregon and of Crown Zellerbach Corporation, for reconsideration of the report, 334 I.C.C. 419, and order of the Commission, Division 3, dated June 6, 1969, including various requests for further hearing and oral argument, and of joint reply thereto by applicants; and

It appearing, That the material matters set forth in the petitions have been considered by the Division and discussed in its report, that the decision is based on adequate findings supported by the record, that there has been presented no error of fact or law with respect to the matters complained of by petitioners, and that no showing has been made warranting reconsideration, further hearing or oral argument:

1. This proceeding also embraces Finance Docket No. 24890, Southern Pacific Co. Common Use of Terminal Facilities—Peninsula Terminal Co., and Finance Docket No. 24891, Southern Pacific Co. —Common Use of Terminal Facilities—Union Pacific Railroad Co.

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Appendix

It is ordered, That said petitions be, and they are hereby, denied, and that the order of the Division dated June 6, 1969, be, and it is hereby, made effective 20 days from the date of service of this order.

By the Commission, Division 3, acting as an Appellate Division.

H. NEIL GARSON
Secretary

(SEAL)

Appendix D

SERVICE DATE
NOVEMBER 26, 1969

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 21st day of November, 1969.

Finance Docket No. 24679

SPOKANE, PORTLAND & SEATTLE RAILWAY
COMPANY AND UNION PACIFIC RAILROAD
COMPANY—CONTROL—PENINSULA
TERMINAL COMPANY

Finance Docket No. 24890

SOUTHERN PACIFIC CO.—COMMON USE OF
TERMINAL FACILITIES—PENINSULA
TERMINAL CO.

Finance Docket No. 24891

SOUTHERN PACIFIC CO.—COMMON USE OF
CERTAIN TERMINAL FACILITIES—
UNION PACIFIC CO.

Upon consideration of the record in the above-entitled proceedings, including the petitions of Southern Pacific Company, Chicago, Milwaukee, St. Paul, and Pacific Railroad Company, Public Utility Commission of Oregon, The Port of Portland, and Crown Zellerbach Corporation, filed November 12, November 13, November 17, November 12, and November 17, 1969, respectively, under the provisions of section 1.101(a)(4) of the General Rules of Practice before the Commission for a finding that an issue of general transportation importance is involved; and

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Appendix

It appearing, That no issue of general transportation importance is involved in these proceedings:

It is ordered, That the said petitions be, and they are hereby, denied; and

It is further ordered, That the order of June 6, 1969, by Division 3, shall be effective 20 days from the date this order is served.

By the Commission.

H. NEIL GARSON
Secretary

(SEAL)

Appendix E

INTERSTATE COMMERCE COMMISSION

Served September 24, 1968

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D.C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions. If the recommended order becomes effective as the order of the Commission, a notice to that effect, signed by the Secretary, will be served.

Finance Docket No. 24679¹

**SPOKANE, PORTLAND & SEATTLE RAILWAY
COMPANY AND UNION PACIFIC RAILROAD
COMPANY—CONTROL—PENINSULA
TERMINAL COMPANY**

Decided.....

In Finance Docket No. 24679 and related petitions, control by Spokane, Portland & Seattle Railway Company, Union Pacific Railroad Company, and the inclusion therein of Southern Pacific Company, through pur-

1. This report also embraces Finance Docket No. 24890, Southern Pacific Co.—Common Use of Terminal Facilities—Peninsula Terminal Co., and Finance Docket No. 24891, Southern Pacific Co.—Common Use of Certain Terminal Facilities—Union Pacific Co.

chase of all outstanding stock of Peninsula Terminal Company, and sale of an equal interest therein, subject to conditions subsequent, to Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and authorization of trackage use for access to Peninsula Terminal Company, found to be consistent with the public interest, and application and petitions in all other respects denied. Conditions prescribed.

In Finance Docket Nos. 24890 and 24891, common use by Southern Pacific Company of the terminal facilities, including trackage of Union Pacific Railroad Company between Peninsula Terminal Company and the Southern Pacific Company-Union Pacific Railroad Company connection at East Portland, Oreg., found to be in the public interest and to be practicable, without substantially impairing the ability of Union Pacific Railroad Company to handle its own business, and applications in all other respects denied. Conditions prescribed.

Hugh L. Biggs, James Warren Cook, Richard Devers, Randall B. Kester, F. J. Melia, R. Paul Tjossem, and John F. Weisser for applicants in Finance Docket No. 24679.

Charles W. Burkett, W. Harney Wilson, and Oglesby W. Young for applicants in Finance Docket No. 24890 and No. 24891, and petitioner in Finance Docket No. 24679.

Raymond K. Merrill, Warren H. Ploeger, Thomas H. Ploss, and E. O. Schiewe for petitioner in Docket No. 24679.

Lloyd A. Combs, William M. Dunegan, John L. Green, Richard H. Kraushaar, Robert K. Little, Hollis Menow, Harold A. Ross, Edgar E. Smith, Homra C. Watson, and Milton A. White for protestants in each proceeding.

Dale T. Crabtree, Samuel P. Delisi, Milton A. Mowat, Richard W. Sabin, Robert W. Skirvin, Lofton L. Tatum, Robert Y. Thornton, and Henry M. Wick, Jr. for intervenors in each proceeding.

REPORT AND RECOMMENDED ORDER

BY SAMUEL C. SHOUP, HEARING EXAMINER

In Finance Docket No. 24679, by joint application filed July 25, 1967, Spokane, Portland & Seattle Railway Company (SP&S) and Union Pacific Railroad Company (UP), pursuant to section 5(2) of the Interstate Commerce Act, seek authority to acquire control of the Peninsula Terminal Company (Peninsula) through purchase in equal shares of all of Peninsula's capital stock.

By petition filed August 23, 1967, Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Milwaukee) seeks inclusion in the proposed transaction in Finance Docket No. 24679 and if consummated authorized (1) to purchase one-third of the outstanding capital stock of Peninsula (2) to pay one-third of the contribution to capital of \$70,000 to cover the purchase of two diesel locomotives, and (3) to acquire rights over track jointly owned by UP and SP&S from the main-line of SP&S to Peninsula's lines upon reasonable terms and conditions as negotiated by the parties, or as found just and reasonable by the Commission. Separate replies to the petition were filed December 29, 1967, by UP and SP&S. UP contends generally (1) that Milwaukee is not a railroad in the territory as used in section 5(2) of the act because it does not serve the Portland terminal area, (2) that if Milwaukee is granted trackage rights between Longview Junction and Portland as a condition or to approval of the Northern Lines merger, in Finance Docket No. 21478, *Great Northern Pac. Merger-*

Great Northern, 331 I.C.C. 869, nevertheless it would be unable to serve the Portland Terminal area unless there is a separate application and Commission's approval of operations under such trackage rights, (3) that if Milwaukee operates to and from the Portland Terminal area, it would not connect with Peninsula because the segment of track between Peninsula and the Northern Pacific Railway Company (NP)-SP&S main line is jointly owned in whole or in part by UP, NP, SP&S, and Peninsula, and joint use of such trackage cannot be granted in these proceedings, and (4) that joint stock control as requested is not in the public interest and would lead to cumbersome, confused, and divided management. SP&S in its reply generally alleges that inclusion of Milwaukee as a joint stock owner of Peninsula is not in the public interest and that joint use of trackage at North Portland to reach tracks of Peninsula is not in the public interest because of joint carrier use of the interchange tracks there.

By amended petition filed November 29, 1967, Southern Pacific Company (SP) requests as a condition to approval of the application in Finance Docket No. 24679, (1) that SP be included as an equal joint owner of Peninsula, and (2) that SP be granted bridge trackage rights over UP's main line, and terminal trackage between Peninsula and the SP-UP track connection at East Portland, Oreg., as a condition to participation in joint ownership of Peninsula under section 5(2)(d) of the Act, and in event either or both of the applicants decline to participate in the acquisition subject to such condition an order be entered pursuant to section 3(5) of the Act authorizing SP to use the said UP trackage. UP and SP&S by joint reply thereto, filed December 13, 1967, (1) contend that to grant petitioner's request would unduly broaden the issues, and (2) indicate

that such a request should be made in a separate proceeding pursuant to section 3(5) of the act.

In Finance Docket Nos. 24890 and 24891, by separate applications each filed December 19, 1967, Southern Pacific Company, pursuant to section 3(5) of the act, seeks, in Finance Docket No. 24890, (1) common use of the terminal facilities of Peninsula and (2) bridge trackage rights over UP between Peninsula and the SP-UP connection at East Portland, Oreg., and in Finance Docket No. 24891, common use of the terminal facilities of UP between Peninsula and the SP-UP connection at East Portland, Oreg. These applications were filed, in addition to the above described SP petition, to assure relief both under section 5(2)(d) and section 3(5) of the Act because of the permissive nature of conditional grants by the Commission under section 5(2) which the parties, in their discretion, may elect to exercise. *Houston Belt & Term. Ry. Co. Control*, 275 I.C.C. 289, 312.

The applications, and the petitions and replies thereto were referred to the examiner for hearing on a consolidated record and the recommendation of an appropriate order thereon. Hearing was held at Portland, Oreg., on February 26 through 29 and March 1, 1967. Eight railway employee organizations² oppose each of the applications. The Port of Portland Commission, the Public Utilities Commissioner of Oregon, and Crown Zellerbach Corporation intervened in

2. Brotherhood of Locomotive Engineers; Brotherhood of Locomotive Engineers Division representing employees of SP&S; Brotherhood of Locomotive Engineers (Union Pacific Railroad Northwest District, Oregon Division); Brotherhood of Railway Clerks representing employees of Portland Terminal Railroad; Brotherhood of Locomotive Engineers of Portland Terminal Railroad Company; Southern Pacific Railroad Yardmasters of North America, Inc.; Railroad Yardmasters of North America, Inc.; Portland Terminal Railroad Co.; and Switchmens' Union of North America.

each of the proceedings in support of positions hereinafter described. UP and SP&S oppose the SP applications in Finance Docket Nos. 24890 and 24891 and request that the petitions of Milwaukee and SP be denied. The parties hereto are hereinafter referred to by appropriate short titles. Briefs were filed separately by each of the applicants and petitioners in the proceedings, and by The Port of Portland Commission (The Port) and the Public Utility Commissioner of Oregon and Brotherhood of Locomotive Engineers.

Peninsula is a terminal railroad Oregon corporation subject to Part I of the Interstate Commerce Act engaged in switching operations at North Portland, Oreg. North Portland is within the Portland switching district. Portland is a major deep channel seaport, transportation, and distribution center serving the Pacific Northwest and the Continental United States. The western end of Peninsula's main line extends to a Crown Zellerbach pole yard (See Map, Appendix A) at the eastern tip of Rivergate Industrial District (Rivergate), hereinafter described, affording potential connection with a proposed Rivergate rail system and the impetus for unusual carrier, industry, and public interest in these proceedings. Peninsula owns no tracks within Rivergate. It serves the pole yard by using industrial tracks of Zellerbach there. Peninsula was established as an essential for operation of Portland Union Stockyards (Portland Stockyards) to facilitate handling livestock, and to provide a rail connection between the stockyards and trunk-line railroads serving the Portland area. The Commission in Docket Number 8389 on October 18, 1930, authorized Peninsula to operate as a terminal switching railroad. Sometime prior to 1936, Swift & Company acquired interests in various stockyards and terminal rail facilities, in-

cluding the Portland Stockyards and Peninsula which the former owned. Pursuant to a consent decree obtained by the U.S. Attorney General in a U.S. Court injunction proceeding brought under the Sherman Act and the Clayton Act, Swift divested itself of stock interest in certain stockyards and terminal carriers. One of the properties, Portland Stockyards, was sold to United Stockyards Corporation (United), presently a division of the latter. Since January 1, 1968, Portland Stockyards has been leased to and operated by Portland Livestock Market, Inc. (Portland Livestock). Control of Peninsula, through stock ownership by United, was authorized by the Commission, Division 4, on March 9, 1943, in *Stockyards Ry. Co. Control*, 254 I.C.C. 207. United's interest in railroad operations extends only to those necessary for its stockyards' operation. Since it acquired Portland Stockyards, operations there have materially changed. Whereas, it was used to supply cattle for Swift's meat packing operations, it presently is an auction yard. Swift & Company presently processes only agricultural chemicals, hides, and wool at North Portland and the volume of that activity is expected to decline. Crown Zellerbach Corporation (Zellerbach) recently acquired the North Portland Swift property and expects to establish a 200,000 square foot warehouse and an ink manufacturing factory there. Zellerbach also has its Flexible Packaging Division plant at North Portland and operates the above-described pole yard at the west end of the Peninsula line in the Rivergate area. Peninsula serves thirteen industries on its line other than the stockyard. As a result of the changes, Peninsula has become less important to Portland Stockyards and United has no interest in operating a railroad independent of stockyard operations. It therefore proposes to sell all of the stock in Peninsula at a reasonable price established

through a 1962 appraisal by American Appraisal Company and has no preference as to the purchaser. The Commission is represented as having accepted the valuation of the properties of Peninsula based upon historical book cost. The agreed purchase price of Peninsula under a contract of purchase dated February 28, 1967, between United and SP&S and UP is a total of \$299,405 for all outstanding shares of common stock of Peninsula plus a sum of \$70,000 to reimburse United for two switch engines sold by United to Peninsula representing an unsecured account payable to United. Settlement to be made by checks of purchasers upon approval of the transaction. The appraisal was based on empty land, plus local costs of roadway and structures, less depreciation. Adjustment of the appraisal, at the time of contract of sale was made only as to rolling stock, working capital, and miscellaneous betterments. The President of Peninsula represents that the contract price is fair and reasonable.

Peninsula properties consist of 13.17 acres of land, none suitable for industrial development, 15,559 feet of main line track plus spurs and sidings or a total of 3.79 miles of main line and secondary and spur track laid on treated ties in sand with no rock ballast. The distance from one end of the line to the other is about 8,000 feet with a 5-foot elevation to its eastern end. The above-noted two locomotives owned by Peninsula consist of a 50-ton G. E. electric, and the other, a 70-ton Copper Bessimer electric, including tools and parts for operation and maintenance. Tools for track maintenance, a conveyance for workmen, a heated engine house for both locomotives, a yard office (14 feet by 23 feet 6 inches in size), and a sand house (11 feet by 18 feet in size) are also owned.

Officials of Peninsula are T. E. Rockford, President (also an employee of United), R. W. Hunt, Vice-President, C. N. Curtis, Secretary-Treasurer. All except Hunt are stationed in North Portland where they handle accounts, labor, claims, demurrage, and interchange, and clerical work of the carrier. They are all United-Peninsula joint employees. United pays them and bills Peninsula for a portion of their services. Insurance matters of Peninsula are handled by United in Chicago where Hunt is stationed.

Peninsula receives cars directly from and delivers cars to SP&S, NP, UP, and Great Northern Railway Company (GN) (empty and loaded) at North Portland, which total about 30 cars daily handled through the North Portland Freight Station with an office located at the Portland Stockyards. The cars move to or from double main-line tracks jointly owned by SP&S and NP, extending from Vancouver, Washington, south across the Columbia River, through North Portland and across the peninsula at the junction of the Columbia and Willamette Rivers (the peninsula) to SP&S Doan Street Yard and the Portland Terminal Company's Guild's Lake Yard. At North Portland there is, among other things, a head block on the SP&S-UP tracks and a 259.5-foot track extending therefrom to four North Portland interchange tracks 2,400 feet in length which accommodate from 30 to 35 cars each. One, is used by Peninsula for receipt of cars from the trunk lines. The second is used by Union Pacific to receive cars from Peninsula, GN, NP, and SP&S. The third is used by SP&S, NP, and GN to receive cars from Peninsula and UP, and the fourth is an open or running track. Two of the interchange tracks are owned, one-half by Peninsula, and one-half jointly by UP, SP&S, and NP. The other two tracks are owned jointly by UP, SP&S, and NP. The interchange tracks connect directly

with Peninsula's main line track to the north and also with a single-line track of OWR&N (a UP subsidiary) extending about 1.7 miles southerly across tracks of UP to Peninsula Junction, and thence about 2.6 miles through a tunnel near St. Johns Junction to Albina Yard. The interchange tracks are used by Peninsula, UP, NP, and SP&S as joint owners, and by GN under a contractual arrangement. The use includes interchanges between the four trunk lines and also between those lines and Peninsula. Actually about 8,100 cars are interchanged there of which 39 percent represents Peninsula interline business. All the cars are either billed from or consigned to industries in the Portland area. Service at North Portland is provided through a joint local freight agent of the trunk lines who informs Peninsula of industry service requested as to outbound moves. The agent prepares the inbound interchange reports and Peninsula the outbound interchange reports. Outbound bills of lading of the four trunk lines are signed by the joint agent. Expenses of maintaining the North Portland station are prorated among the four lines by car count, loaded and empty, with the joint facility invoice prepared by the operating road, UP or SP&S. The joint agent recommends no routings for shippers and receives no open-route car orders. Usually there are four deliveries and two pickups daily of cars moving to or from Peninsula by SP&S or UP. Cars from Peninsula could move by UP to the pass near Peninsula Junction, to Kenton Yard (about 2.6 miles southeast of Peninsula Junction) or to Albina Yard. Cars picked up from Peninsula by SP&S usually move to Vancouver. In addition to the above-described North Portland Freight Station, there is a yard office at the eastern end of the interchange tracks. The yard office is maintained jointly by

SP&S and UP under terms of a 1912 agreement which established the North Portland Freight Station. Four clerks at the yard office are UP employees and four clerks at the North Portland Freight Station are SP&S employees.

Peninsula also provides local intra-plant and intra-terminal service. It has established Local Switching Tariff No. 23, effective September 23, 1965 (not applicable to rail line haul service), which among other things provides a \$22.44 per car charge for each car movement and service charges for the handling of livestock. No other switching tariff is published by it. Peninsula solicits no traffic and traces no shipments moving beyond its line. Revenue from its connecting rail carrier service is derived from a division of revenue, billed and collected by the trunk line, generally amounting to \$29.25 a car when the car revenue exceeds \$60. The agreed rate divisions were established by Joint Division Sheet 8-R issued by North Pacific Coast Freight Bureau, Seattle, Wash., effective July 1, 1964. Usually the line-haul carriers absorb the division charges. Its locomotives and crews operate two 8-hour shifts each day of the week, one from 9:00 a.m. to 5:00 p.m. and the other from 9:00 p.m. to 5:00 a.m. Light repairs of roadbed and equipment are made by regular Peninsula employees and heavy repairs by part-time employees. Since January 1, 1968, by agreement with Portland Livestock, Peninsula employees load and unload livestock.

Basic Labor agreements were entered into by Peninsula on April 14, 1943, with the Brotherhood of Railroad Trainmen and on June 15, 1944, (since modified) with the Brotherhood of Locomotive Firemen and Engineers. Peninsula engineers are paid \$29.05 or \$32.68 a day for service exclusive of repairs and maintenance with no holidays. They receive vacation and insurance benefits equivalent to employ-

ees of trunk-line carriers. Switchmen receive \$27.88 a day and the footboard yard master \$30.21 with seven annual holidays, extra pay for work on holidays, and vacation; insurance and welfare benefits similar to the engineers'.

United has agreed to manage Peninsula after the purchase in accordance with policies of its director, including supervisory, accounting, stenographic and other necessary managerial services as presently provided. United may terminate the agreement on 6 month's notice and the purchasers may terminate it on 30 day's notice.

During 1960, Peninsula handled 4,993 loaded or partially loaded cars compared to 2,748 cars in 1967. The latter represents about 39 percent of all cars interchanged at North Portland. The other 4,300 cars were interchanged between SP&S, NP, and GN, on the one hand, and, on the other, UP. From 1960 through 1967, there was a decrease in movements of livestock and packinghouse products and an increase in wood products. For example, in 1967, 34 percent of the cars handled transported wood products, 33 percent chemicals, 8 percent livestock, 7 percent packinghouse products, 13 percent paper products, and 5 percent other. In 1960, 16 percent of the cars handled wood products, 8 percent chemicals, 48 percent livestock, 15 percent packinghouse products, 6 percent paper products, and 7 percent other.

The statement of assets and liabilities of Peninsula as of February 1967, reveals total assets \$239,716, including current assets, \$35,038 (cash on hand, \$17,365, accounts receivable, \$7,888, materials and supplies, \$8,669, and prepayments of insurance and other, \$1,116), properties—transportation road and equipment, less depreciation, \$196,938, and miscellaneous physical property, \$7,740. Its expense

and retained income statement for each of the calendar years, 1962 through 1966, and for February 1967, reveals, among other things, total railway operating expenses for February 1967, \$14,774, and for 1966, \$81,244, total income before fixed charges for February 1967, a minus (\$725) and for 1966, \$13,320 less miscellaneous rents paid, \$1. Rent for leased road equipment for 1966 was \$3,200 and for January 1967, \$533. The balance of retained income for February 1967, was \$7,504 and for 1966, \$8,762. At the beginning of 1962, its retained income was \$151,208, which by the end of February 1967, was reduced to \$7,504, after adding annual income (less losses), and subtracting dividends of \$167,556 paid during 1966.

Rivergate Industrial District (Rivergate.) consists of about 2,942 acres of public owned peninsula land at the junction of the Columbia and Willamette Rivers generally north of and adjacent to Portland's corporate limits. This land is under the jurisdiction of, and is being developed by, The Port for industrial use. It has about 6 miles of water front on 40-foot navigation channels of the Willamette and Columbia Rivers. Presently there are five industrial activities within Rivergate together occupying 265 acres, or less than one-tenth of the ultimate available area. These are Ashgrove Lime and Portland Cement Company, Conmetco Division of Consolidated Freightways, Collier Carbon and Chemical Company, and Oregon Steel Mills on the western side and the Zellerbach Pole Yard on the eastern end. Much of it is marsh land to be filled by dredging operations. An 18-month planned study of a 14 square-mile peninsula area including Rivergate by The Port's consultants, Daniel, Mann, Johnson, and Mendenhall of Los Angeles, Calif., known as the D.M.-J.M. report was dated September 14, 1967. Recommendations therein include a Rivergate railway system connecting with rail trunk lines. Two alternate

Rivergate rail access routes include (1) that over the existing tracks of The Port which connect with those jointly owned by SP&S and UP entering the southwestern area of Rivergate, and (2) the possible construction on the eastern side of Rivergate of an SP&S main line extension or an extension of Peninsula's tracks into the area.

SP&S, a class I railroad, and a wholly owned subsidiary of NP and GN, operates over lines generally extending from Spokane through Pasco along the north side of the Columbia River to Vancouver, Wash., thence across the Columbia River through North Portland, thence across the east-west line of UP on the peninsula, and thence across the Willamette River, through Doane Lake Yard and Willbridge, Oreg., to Guild Lake Yard. The latter connects with Portland Terminal Company tracks in downtown Portland. A connecting track at the intersection of SP&S and UP lines on the peninsula affords access to Barnes yard. SP&S has trackage rights at Barnes Yard and at Terminal No. 4. UP and SP&S jointly own tracks extending from Barnes Yard to the southwestern side of Rivergate which connect there with those of the Port of Portland. The SP&S Vancouver-Willbridge track, constructed in about 1908 with an industrial spur at North Portland, is jointly owned by SP&S and NP. In 1909, OWR&N (UP) constructed a track connecting Albina with the spur track, and a year later built a bypass track at the North Portland Junction. The bypass enables operation between Albina and North Portland interchange tracks without entering the SP&S-NP main line. SP&S and NP switch cars at North Portland on a 2-year alternating basis. Additionally, SP&S owns Oregon Trunk Railroad extending from Wishram, Wash., a point on the SP&S line, to Bend, Oregon, and also owns Oregon Electric Railway Co., extending south from Portland to Eugene.

Oregon. SP&S directly serves industries on its lines and those on lines used jointly by it located on the southwest side of the Willamette River at Portland including industries and docks also served by Portland Terminal Company. It serves industries at East Portland by use of the UP-SP steel bridge across the Willamette River near the Portland Terminal Company's Depot and yard. SP&S switches cars to and from points in the East St. Johns and the Terminal No. 4 areas north of the Willamette River and south of Rivergate. SP&S delivers cars daily to the North Portland interchange tracks at 2:30 a.m. and 11:00 a.m. and picks up cars there at 9:30 a.m. and 6:00 p.m. UP also picks up and delivers cars there daily at 6:30 a.m. and 2:30 p.m. The switching distance from North Portland interchange tracks to connection with SP at Albina yard or Portland Terminal Company Hoyt Street yard is about 6 miles and cars switched from and to those points should require about one hour. North Portland line haul traffic of NP and GN is usually moved twice daily to and from Vancouver. SP&S switches all Vancouver cars including those of UP. SP&S assesses a tariff switching charge for movement of cars to and from Peninsula interchange. It is possible for GN, NP, and Burlington under joint arrangements to handle Milwaukee traffic to and from North Portland interchange tracks. SP&S as owner of Peninsula could obtain Peninsula trackage rights which are essential to any agreement for switching operations. Presently Milwaukee could interchange cars with SP&S at Vancouver for movement to the peninsula by payment of a division of the through rate. In the absence of Milwaukee trackage rights there the receiving carrier could designate car delivery points of Milwaukee cars. With interchange trackage rights at North Portland it could enter into a car pulling agreement for movements from Vancouver.

SP&S indicates that the extension of Peninsula to serve the Rivergate is uncertain because of heavy curvature, impaired clearances, and low standard tracks of Peninsula, but alternation will become necessary with growth of the district; that a new direct access track from the SP&S main line at North Portland may be feasible; and that if such a track is constructed SP&S and UP have assured the Port of Portland they would provide service similar to that now available in the southwest part of the district. SP&S has made no decision respecting the planned additional access route to Rivergate. It expects to provide adequate switching service into the area as required.

SP&S opposes any ownership of, or trackage rights to serve, Peninsula by SP and Milwaukee, and indicates such rights and ownership would result in unnecessary duplicating tracks and service contrary to the public interest. It represents that existing routes, rates, and traffic will not be affected by the SP&S-UP proposed purchase of Peninsula. Milwaukee and SP now serve Peninsula shippers through connecting carriers and use of joint rates and routes. UP and SP&S and its parent lines provided line-haul service for about 70 percent of Peninsula's traffic during 1966, and 82 percent in 1967. The interchanging of 3,640 cars handled during 1966, between Peninsula and UP and SP&S and parent lines was 54 percent for SP&S and parent lines and 46 percent for UP. Twenty percent of the cars were routed SP and 1 percent Milwaukee. In 1967, SP routed 17 percent and Milwaukee 1 percent of the line haul for 2,748 handled by Peninsula. Nevertheless, a representative of SP&S doubts that carriers with no direct Rivergate access rights would have as much incentive to do business there as a direct access carrier. Normally the switching

carrier has a solicitation advantage. If Milwaukee has no direct Rivergate access on competitive traffic it must absorb an SP&S switching charge (presently 6 cents a hundred-weight) and pay a Peninsula rate division of \$29.25 a car when the car revenue exceeds \$60, on its traffic which would move through East St. Johns. Usually, line-haul carriers absorb no switching charges on unit train service or cars containing low rated commodities, and the payment of such charges by shippers discourages business. SP&S indicates Milwaukee might participate in a greater share of Peninsula traffic if its operation is extended to Portland. The SP&S representative concedes that if Milwaukee owns no part of Peninsula and cannot use the North Portland interchange tracks, it cannot compete equally with SP&S for Peninsula traffic. However, SP&S is willing to accept the standard section 5(2) proceedings' conditions (See *Southern Pacific Company—Merger—Pacific Electric Railway Company*, 327 I.C.C. 38) in event of a grant to assure participation by SP and Milwaukee in traffic moving to and from Peninsula as follows:

Upon consummation of the acquisition, Peninsula shall maintain and keep open all routes and channels of trade via existing junctions and gateways unless and until otherwise authorized by the Commission.

The present neutrality of handling traffic inbound to Peninsula by UP and SP&S shall be continued so as to permit equal opportunity for service to and from all lines reaching Peninsula through their connections with UP and SP&S and its parent lines, without discrimination as to routing or movement of traffic and without discrimination in arrangement of schedules or otherwise.

The present traffic and operating relationships existing between Peninsula on the one hand and all lines reaching Peninsula through UP, SP&S or its parent lines on the other, shall be continued insofar as such matters are within the control of UP, SP&S or its present lines.

UP, SP&S and its parent lines shall accept, handle and deliver all cars inbound and outbound, loaded and empty, without discrimination, in promptness or frequency of service as between cars destined to or received from competing carriers, and irrespective of destination or route of movement.

UP, SP&S or its parent lines shall not do anything to restrain or curtail the right of industries, now located on Peninsula, to route traffic over any and all existing routes and gateways.

Any party or person having an interest in the subject matter may at any future time make application for such modification of the above conditions, or any of them, as may be required in the public interest, and jurisdiction of the Commission may be retained to reopen this proceeding on the Commission's own motion for the same purpose.

SP&S first became aware of United's desire to sell Peninsula in 1963, but serious purchase negotiations were not commenced until sometime in 1966. When UP learned of the negotiations it became a party to them. If the application of these carriers is granted they intend to continue the corporate entity of Peninsula and its present management with present employees under joint supervision by the purchasers. The same management would permit an orderly carrier transition. SP&S has no objection to the Commission's prescription of conditions for protection of employees

as set forth in *Chicago & N.W. Ry. Co. Merger*, 261 I.C.C. 672, as follows:

During the period of 4 years from the effective date of our order herein such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this section shall not be required to continue for a longer period, following the effective date or such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order.

The SP&S parent companies' ownership is in issue in *Great Northern Pac.—Merger—Great Northern, supra*. Pursuant to proposals therein, on October 26, 1966, Milwaukee entered into a written agreement with GN, NP, Chicago Burlington & Quincy Railway, SP&S, and the New Company (The Great Northern Pacific & Burlington Line, Inc.), which as pertinent provides:

Effective upon the consummation of the consolidation proposed in Finance Nos. 21478, et al., the Milwaukee shall receive all of the six (6) conditions as sought by it in the aforesaid proceedings, as follows:

Condition No. 2—Entry into Portland and Trackage Rights between Longview Junction and Portland.

Provisions of the agreement relating to implementation of Condition No. 2 require the New Company or SP&S, where possible, to grant Milwaukee trackage rights over present NP and SP&S tracks between Longview Junction and Portland, including the right to serve on an equal basis all pres-

ent and future industries at Portland and intermediate points and the use of New Company facilities at Portland necessary for the switching of traffic to other railroads and industries. There is no specific reference therein to North Portland, or use of the North Portland interchange tracks.

The SP&S financial statement as of February 28, 1967, shows total assets, \$139,634,532, including current assets, \$12,775,147, special funds, \$123,381, investments, \$30,586,097, properties less depreciation and amortization, \$95,735,982, and total other assets and deferred charges, \$413,925. Liabilities include current liabilities (exclusive of long-term debt due within 1 year), \$8,928,010, long-term debt due within 1 year, \$793,842, long-term debt due after 1 year, \$45,650,781, reserves, \$156,042, other liabilities and deferred credits, \$158,704, capital stock, \$40,000,000, capital surplus, \$9,300,000, and retained income, \$34,647,153.

UP, a class I railroad corporation, as pertinent, operates over trackage extending (1) from Seattle to Portland, (2) from Portland, through O. T. Junction, and Hinkle, Ore., Pocatello, Idaho, and Cheyenne, Wyo., to Omaha, Nebr., (3) from Cheyenne, through Denver, Colo., to Kansas City, Mo., (4) from Spokane, Wash., to Hinkle, (5) from O. T. Junction, Oreg., to Bend, Oreg., and (6) from Pocatello to Los Angeles, Calif. UP connects at Bend with GN which latter carrier's line extends through Chemult and Klamath Falls, Oreg., and Bieber, Calif., to connect there with Western Pacific extending through Sacramento to San Francisco, Calif. UP tracks enter Portland from the east forming a great loop extending from a wye near Troutdale, 14 miles east of the Willamette River at Portland. One track extends from Troutdale generally west parallel with the Columbia River through Kenton Yard, Peninsula Junction, across the SP&S-NP tracks which enter Portland from the north, thence

through Barnes Yard to the southwestern side of Rivergate and Terminal No. 4, and returns along the north side of the Willamette River through St. Johns Junction located in Swan Island Industrial Park, through Albina past the entrance of the Steel Bridge (which affords access to the Portland Terminal Company's yard and depot in downtown Portland) to East Portland (junction with SP), thence generally east through Sullivan Gulch to Troutdale. Track at the west end of the loop near Barnes Yard jointly owned by SP&S connects with Rivergate where UP has served Ash Grove Lime and Cement Company. An OWR&N (UP) track segment extends from North Portland interchange tracks, through St. Johns Junction, and Albina Yard to East Portland. This track, not a main track, was mentioned in connection with SP&S tracks. It crosses the western end of the UP loop as does the SP&S-NP tracks west thereof. This segment of track is of particular significance in these proceedings. SP traffic now moves or is expected to move over it. An issue respecting congestion of traffic on the track segment is raised by UP in its opposition to the SP proposals. The distance over the segment from North Portland interchange tracks to the north end of Albina Yard is 5.2 miles. From the connection of the North Portland interchange tracks with Peninsula over the OWR&N tracks to its intersection with the UP track at Peninsula Junction is about 2.04 miles. At this intersection connections permit switching in four directions. Operation over the turnouts there is limited to 15 miles per hour. Near this intersection UP also has a bypass track which will accommodate about 10 cars. The distance from Peninsula Junction over the segment south through a 1-mile tunnel to St. Johns Junction is about 2.16 miles and the distance beyond St. Johns Junction over the segment to the north end of Albina Yard is 1.02 miles. The track segment generally is level with the exception of the 5/10 of 1 percent grade increase from Albina Yard to the

center of the tunnel. There is only one significant highway grade crossing on the segment at Columbia Boulevard which has a flashing light signal. There are also two or three private grade crossings near Peninsula Junction. Between Albina Yard and North Portland there is a 131-pound single-line track laid on rock ballast having no curves which create operating problems. Operation over the segment of track between Peninsula Junction and Albina Yard is presently controlled by a central traffic control system from Albina Yard. Albina Yard is a large and important classification and transfer yard of UP including about 44 tracks which will accommodate from 15 to 20 cars each extending about $\frac{3}{4}$ of a mile in length. The Willamette River lies along the western side of the yard and a super highway and a bluff lie along its eastern side limiting expansion. However, a map in evidence reveals that the yard at its center is about 500 yards wide and near its south end 666 yards wide. Most UP traffic to or from the Portland area moves through this yard. There is a 400 by 150-foot freight house at the south end of the yard. This is used in part as a salvage depot by UP and in part by shipper lessees. All of the tracks are used for switching purposes by UP. It endeavors to keep open one or two of the center tracks in the yard to accommodate through traffic. None of the tracks are permanently designated as running tracks although a substantial amount of through traffic moves through the yard. UP operations at Albina Yard are represented as taxed to capacity, with no room for expansion there. Switch engines operate out of there to serve Kenton Yard, North Portland Barnes Yard, East Portland, Sullivan Gulch, and Portland Terminal Company. They move, in addition to freight, passenger trains to and from Portland Station. Two such trains operate each way daily through Sullivan Gulch. Other passenger

trains moved by engines from Albina operate out of Portland station over the SP&S main line through North Portland and not through Albina Yard. Five UP freight trains operate each way daily over the track segment between Albina Yard and North Portland Junction. Delays at North Portland Junction interlocker are not uncommon with some delays as long as 80 minutes. SP uses the track between Brooklyn Yard and Albina Yard for freight moving to and from North Portland. The speed of traffic through the interlocker at East Portland is limited to 8 miles an hour. SP proposes to handle cars from Brooklyn to North Portland. UP represents that if the SP applications are granted congestion would occur principally on the single-track segment between St. Johns Junction and Peninsula Junction; that three fourths of the UP trains arriving at Albina Yard via Kenton are delayed from 15 to 180 minutes because of Albina Yard congestion. Also, there is a 1.2 percent grade on the UP track 1 mile east of East Portland which tends to retard car movements. Usually engines stationed at Kenton Yard are used for switching between Albina Yard and North Portland. There has been a consolidation of the Kenton Yard and Terminal No. 4 engines to eliminate congestion of traffic. There were about 40 to 56 switching moves daily in the Peninsula Junction area during 1967. For example, an average of 40 cars a day moved between October 1 through October 14, 1967, and an average of 37 cars a day moved between January 14 through 27, 1967. From January 26 through January 27 and from October 1 through October 14, 1967, traffic clearances in excess of 30 minutes between Albina Yard and North Portland interchange occurred from about 4 to 11 times or an average of 7.5 times daily. There are four transfer SP trains handled daily at Albina Yard. About six UP trains move each way in addition to trains of

NP, GN, and SP&S over tracks north of North Portland or a total of about 55 trains daily use those tracks. About 30 minutes time should be required to operate a switch engine with a few cars over the cleared track segment between North Portland and Albina Yard. However, an average of about 30 hours has been required for the movement of SP cars and also those of UP between Albina Yard and North Portland. UP does not consider a 30-hour transit time adequate service and has endeavored to reduce the running time by the described consolidation of its Kenton-Terminal No. 4 terminal service, by the establishment of the above described central traffic control, by breaking trains at Seattle, Dow, Hinkle, and Pocatello to avoid switching at Albina Yard, and by increased operation through Sullivan Gulch.

There is a double track extending from the south end of Albina Yard to East Portland and the junction of the SP there. Even though traffic congestion exists at Albina Yard, UP nevertheless represents that it can provide Rivergate any service through Peninsula needed and represents that its present service in the involved area meets shippers' demands for service. The Steel Bridge crossing the Williamette River at East Portland is jointly owned by SP and UP. The bridge, as noted, allows UP and SP to connect with the tracks of the Portland Terminal Company, the Portland Yard, the SP&S Hoyt Street Yard, and the SP&S and NP Guild's Lake Yard, which permits SP to interchange traffic at the latter yard with SP&S or NP. Portland Terminal Company is a terminal switching company owned 40 percent by UP, 40 percent by NP, and 20 percent by SP.

UP, as noted, physically connects with Peninsula at North Portland, and interchange junction point and station on GN, NP, SP&S, and UP, within the Portland switching district. The physical interchange of line-haul traffic moving

by UP or its connections is performed by UP. On traffic moving to and from SP via SP&S, NP, GN, and UP from and to industries located on Peninsula, SP absorbs the Peninsula's rate division, and on traffic in which Milwaukee participates through joint routings, no switching charges are passed on to the shipper or consignee. UP expects to continue its policy of permitting line-haul carriers having no physical interchange with Peninsula to reach, through existing joint rates and routes, industries on the latter's line.

UP's position in supporting its application and in opposing the petitions for inclusion and applications for rights is that a grant of the UP-SP&S application would permit continuation of the Peninsula operation as a separate switching company by trunk line owners at North Portland interchange tracks and the joint operation of the freight station and yard there for their own traffic and an extension of the responsibility of these carriers for continuation of switching services at North Portland for other carriers. UP represents that management of Peninsula would become difficult and indecisive with four owners and that limited ownership would assure keeping the size of the yard facilities and costs of its operation at North Portland at a minimum. UP opposes the SP operation through Albina Yard principally because of congestion which it might create and believes the operation would result in uneconomical and wasteful conditions there. It represents that the operation of SP trains through Albina Yard is not practical because of the large number of trains already moving through the yard.

At the request of The Port and the Commissioner of Public Docks, a railroad conference was held at Portland on June 20, 1967, to consider elimination of non-competitive

switching charges to or from industries located on The Port's property at Swan Island (Albina) and Rivergate to encourage industrial development there. Thereafter, railroads participating in the conference agreed to establish a single basis of switching charges at all common points within Northern Idaho, Washington, and Oregon, with switching charges to be absorbed by the line-haul carriers where the line-haul minimum revenue is \$100 a car after absorption, and no absorption of switching charges when specific tariff rate items are excluded. UP represents that when the agreement is implemented all industries within the Portland Switching District including The Port's Property area served by Peninsula, and points in North Pacific Coast Territory will be on a competitive relationship except for the two conditions noted. UP opposes the petitions of Milwaukee and SP and the SP applications because it represents that all industries located on Peninsula can be served adequately either directly or through applicable effective joint rates and through routes, under the UP-SP&S proposal. It desires to protect its existing traffic and facilities investment. However, a representative of UP indicates that the cost to Milwaukee for handling traffic moving to or from Peninsula with no access right there would be greater than that of UP. It is possible under the conference switching agreement that by payment of the UP or SP&S switching charge the minimum car revenue would be less than \$100 resulting in payment of the switching charges by the shipper and refusal of the shipper to use Milwaukee's service. Also, on a shipment moving from a Peninsula industry to Arizona, routed UP from Peninsula interchange tracks to East Portland, thence SP beyond, SP would absorb the switching charge from Peninsula interchange to East Portland. The principal interest to UP in such a move would be the switch-

ing charge. UP generally has been unwilling to negotiate joint rates with Milwaukee between competitive points such as Spokane, Seattle, and Tacoma. Line-haul rates of carriers (but not all carriers) are applicable on traffic moving to or from Peninsula industries, and when line-haul rates are not applicable, the shipper or consignee must pay an extra switching charge.

The UP financial statement as of December 31, 1966, reveals total assets of \$1,902,430,048, including current assets, \$279,303,599, special funds, \$819,004, investments, \$479,073,070, properties less recorded depreciation and amortization, \$1,136,364,928, and other assets and deferred charges, \$6,869,447. Liabilities and shareholder equity include current liabilities, \$117,797,009, long term debt due within one year, \$17,757,016, long term debt due after one year, \$199,999,694, reserves, \$34,423,776, other liabilities and deferred credits, \$28,293,827, capital stock, \$299,292,350, capital surplus, \$9,374,305, and total retained income, \$1,195,492,071. The UP income statement for years 1962 through 1966 reveals among other things, total fixed charges of \$9,104,258 in 1962 and \$13,035,761 in 1966, and net income after fixed charges and other deductions transferred to retained income, inappropriate, for 1962, \$80,550,226, and for 1966, \$106,268,617. The total UP retained income, inappropriate, at the end of 1966 was \$1,160,899,972.

SP, a class I railroad, operates over trackage generally extending (1) from Portland south through Eugene and Klamath Falls, Oreg., Sacramento, San Francisco, and Los Angeles, Calif., Phoenix and Tucson, Ariz., El Paso and Houston, Tex., to New Orleans, La., (2) from San Francisco through Sacramento, Calif., Reno, Fernley, Weso, and Alazon, Nev., to Ogden, Utah, and (3) from Fernley to Klamath Falls. Service over these tracks is rendered by SP at many

points south and east of Portland in Oregon, California, Nevada, Utah, Arizona, New Mexico, Texas, and Louisiana. At Portland, the northern terminus of SP tracks, as noted, connects with those of UP at an interlocking plant about 375 feet south of the eastern end of the UP-SP Steel Bridge across the Willamette River at Portland. SP maintains a large switching yard at Brooklyn known as the Brooklyn Yard about 2.6 miles south of the interlocker. Trains moving into Portland from the south over SP lines are generally sorted and blocked at Eugene, Oregon, about 125 miles south of Portland and move to Brooklyn Yard for further blocking if required before they are received by UP at East Portland. SP traffic to or from Peninsula moves principally over UP tracks from East Portland through Albina Yard, St. Johns Junction to the North Portland interchange tracks. In some instances SP traffic also moves from East Portland across the Steel Bridge to the Portland Terminal Company yard thence to Hoyt Street Yard for interchange with SP&S and movement over the SP&S main line tracks to North Portland interchange. The distance from Brooklyn over the UP tracks to Peninsula is about 8.59 miles. An SP engine and crew is used to move cars from Brooklyn through East Portland thence over the UP tracks to Albina Yard where they are received by UP for movement to Peninsula. The switch engine and crew of SP performs service from North Portland to Albina Yard as UP's agent. Similarly an SP switch engine and crew moves cars from Brooklyn over the alternate SP&S route to North Portland by operating as far as the Portland Terminal Company's yard where they are received by Portland Terminal Company, as an agent for the latter company. SP represents that if it is granted bridge trackage from the interlocker at East Portland to

Peninsula at North Portland interchange tracks its engines and crews can operate from Brooklyn to North Portland. About 2 hours switching time would be required for a SP engine and crew to operate between Brooklyn and Albina Yard and an additional 1.5 hours between North Portland and Albina Yard or a total of about 3 hours and 30 minutes. There are delays in the movement of traffic over the UP tracks between those points. A 10 percent random sample consisting of 42 cars (from a total of 410 cars) of SP traffic switched to and from Peninsula during 1967 in evidence reveals among other things an average of 32 hours and 10 minutes required for car movements from the SP interchange points to Peninsula when switched by UP or SP&S and an average of 55 hours and 16 minutes when moved from Peninsula to the SP interchange point. SP represents that 30 hours or more required for the movement of cars between Albina and North Portland interchange is excessive and that SP with bridge rights can provide faster service. From 25 to 57 trains, or an average of 40, move over the UP tracks between Albina Yard and North Portland each 24 hours. SP anticipates no operating difficulties or labor complication in connection with its proposed operation over the described UP North Portland-Brooklyn Yard tracks. During 1967 about 490 cars were moved between Brooklyn Yard and North Portland interchange tracks over the described routes. It further represents that the proposed operation of unit trains of iron ore over the described UP tracks to and from Peninsula is feasible.

SP proposes to provide service which will meet the shippers' transportation needs including a scheduled operation to and from Peninsula and to establish Portland rates which include service to and from Rivergate. Presently local moves between Peninsula and many non-competitive Oregon

points require the payment of switching charges in addition to the rate to or from Portland. For example, four carloads of lumber moved during January, February, and April, 1967, by SP from Dallas, Springfield, Millersburg, and North Bend, Oreg., to Shefton Plywood Company, North Portland, for which separate switching charges were paid by the shipper. Such charges usually amount to \$32.29 a car. SP absorbs switching charges in the Portland area if the circumstances justify, but does not absorb such charges on shipments from Oregon origins to Peninsula on low-rated non-competitive traffic. SP represents that Rivergate is unique in that it includes several thousand acres of publicly owned industrial land adjacent to a metropolitan area suitable for use by industries; that the successful development of that property depends upon the flexibility of rail service and that such service for the development involves major markets in California and other states served by SP.

The SP financial statement as of December 31, 1967, shows total assets \$2,449,441,334, including total current assets, \$223,519,955, total special funds, \$1,490,344, net investments, \$182,223,376, total properties less recorded depreciation and amortization, \$2,028,866,435, and other assets and deferred charges, \$13,341,221. Liabilities include current liabilities, \$186,038,487, long-term debt due within 1 year, \$45,704,211, long-term debt, \$730,579,135, reserves, \$10,234,715, other liabilities and deferred credits, \$19,328,532, and total shareholders equity, \$1,457,556,251. The SP retained income account as of December 31, 1967, reveals a credit balance of \$1,032,681,210. The SP income account for the years ending December 31, 1966, and December 31, 1967, reveals among other things that for 1967 net railway operating income, \$52,521,146, total other income, \$39,927,418, miscellaneous deductions from income, \$86,324,468, fixed charges, \$31,607,107, and ordinary income, \$54,717,361.

Milwaukee, a class I railroad, operates over main lines from Seymour, Ind., through Chicago, Ill., Minneapolis, Minn., Seattle and Tacoma, Wash., to Longview, Wash., a point on the Columbia River about 46 miles from Portland. Its main lines also extend from Chicago to Council Bluffs, Iowa, and to Kansas City, Mo. It serves the grain producing areas in Montana and eastern Washington and provides a connecting carrier service from those points to Portland. It also serves much of the forest products producing area in Idaho and Washington and industries in Tacoma, Seattle, Everett, and Bellingham, Wash., north of Portland. Also, service is rendered at the industrial cities, among others, of Chicago, Milwaukee, St. Paul, Minneapolis, Omaha, Kansas City, Davenport, Rock Island, Moline and Bettendorf. At the time of hearing it performed no physical operations to and from the Portland area and was awaiting final disposition and consummation in *Great Northern Pac.—Merger—Great Northern, supra*. In that proceeding, the merger of GN, NP, Pacific Coast R. R. Company, and the Chicago, Burlington and Quincy Railroad Company into Great Northern Pacific & Burlington Lines, Inc., was authorized by the Commission in its report of November 30, 1967, subject to conditions set forth in Appendix "L" thereof, which among things, permits upon consummation of the transaction entry by Milwaukee into Portland and trackage rights between Longview Junction and Portland described above in connection with the evidence presented by SP&S. If the Milwaukee petition herein for inclusion is authorized it expects to operate fast trains between Chicago, Seattle, and Portland and between Portland and Sumas, Wash., with connection at the latter point with British Columbia railroads. However, such service cannot be established if terminal delays occur at Portland which offset the proposed

service advantages. Its proposed service at Portland includes physical operation of its equipment to and from the Peninsula interchange tracks at North Portland. All the industries on Peninsula would be served as on-line industries with no absorption of switching charges. Despite postponement of the effective date of consummation in the Northern Lines merger case pending consideration of various petitions, Milwaukee expects the merger will be confirmed and consummated within a reasonable time, and contingent upon its extension of operations to Portland, requests joint and equal ownership of Peninsula stock with other trunk lines and proposes to assume its share of the portion of the stock and indebtedness as set forth in the application. Its joint ownership is considered essential to its Portland operation to industries located on Peninsula and at Rivergate. Peninsula is the only terminal facility at Portland not owned by trunk lines presently serving that point.

Milwaukee has a centralized, computerized expedited service for tracing, reconsignment, and diversion of cars, and for the elimination of car delays. It owns 39,000 freight cars and in 1967 it transported 61,140 trailers in its trailer-on-flat-car service. It maintains facilities at various points for the loading and unloading of this type of traffic. Since 1963 it has maintained a 55.5 hour schedule service from Chicago to Seattle and 67.25 hour return. Milwaukee represents that if its request for joint ownership and direct access to Peninsula is denied and the northern lines merger consummated, Milwaukee traffic to North Portland would move to Guild's Lake Yard located about 6 miles south of North Portland, by Milwaukee and thence switched by other carriers from that point back to North Portland requiring an extra day in transit. It further represents that such de-

nial would place it at great disadvantage in competing in the Portland area because exclusive control by UP and SP&S of Peninsula would enable those carriers to fix the switching charges of Peninsula to be absorbed by Milwaukee or paid for by shippers; that those carriers could obtain trackage rights over the Peninsula lines because of their joint ownership; and could direct the service and switching to and from points on Peninsula tailored to meet operating conditions of the owner lines with lesser considerations for operations of Milwaukee. If Milwaukee's requests are granted, it expects to absorb the switching charges in the Portland area to the same extent that other carriers absorb them. It represents that the granting of its petition would take nothing of real importance from UP and SP&S because the real potential traffic lies in Rivergate's future development and that the purpose of its petition was to obtain assurance that it will not be foreclosed from serving Peninsula and Rivergate shippers.

Milwaukee is not owned or controlled by any other railroad and does not own or control any other parties to the instant proceedings directly or indirectly. Its officials and directors have no common interest in such parties to this proceeding. Milwaukee does own an interest in a number of other transportation companies not particularly pertinent to these proceedings.

As of December 31, 1967, the Milwaukee financial statement reveals total assets of \$733,708,671 including current assets, \$76,187,097, and special funds, \$1,676,358, investments, \$26,067,221, total property less depreciation and amortization, \$625,512,008; other assets and deferred charges, \$4,265,987. Liabilities include current liabilities, \$54,060,146, long-term debt due within 1 year, \$15,925,685, long term debt due after 1 year, \$284,381,173, reserves, \$1,448,596,

other liabilities and deferred credits, \$4,085,187, and shareholder equity, \$373,807,884. Its income account for the years ending December 31, 1963, to and including December 31, 1967, reveals, among other things, 1967 net railroad operating revenue, \$11,439,385, other income, \$17,177,970, fixed charges, \$8,403,546, other deductions, \$5,669,621, ordinary income, \$2,733,925, prior period items, \$10,222,000, and net income transferred to retained income unappropriated, \$12,955,925. Its retained income statement for the years December 31, 1963 to 1967, inclusive, reveals a credit balance as of December 31, 1967 of \$104,249,684.

COST STUDIES OF SP AND UP

SP presented cost study evidence to show (1) the estimated variable cost to SP for UP and SP&S to handle traffic between SP and Peninsula, (2) the estimated variable cost to SP for handling traffic to and from Peninsula, and (3) the estimated annual net effect on SP resulting from handling traffic directly to and from Peninsula instead of bridging via UP and SP&S. The study covers a proposed operation, and certain trackage assumptions, operating estimates of informed personnel, all known factors, and a 10 percent (42 cars) random sampling of 418 cars handled during 1967 by SP moved to and from Peninsula were relied upon for its preparation. The study shows a weighted average car cost (35 UP cars and 7 SP&S cars) of \$44.27 to SP when UP and SP&S handled the traffic. Effective tariff charges of the involved carriers were used in this portion of the study. The second part of the study shows the estimated variable cost to SP when handling its own traffic between East Port-

land and Peninsula for 1 carload per round trip as \$166.64, 5 carloads \$12.93, 10 carloads \$20.94, 15 carloads \$15.53, and 20 carloads \$12.93. The total of trackage, switching, and car rental costs were used in computing this portion of the study. The trackage costs are calculated upon a percentage of use by SP basis (0.58% for 1 carload round trip and varied increased percentages for greater numbers of cars), including 5 percent interest on reproduction costs, less depreciation (\$5,360,000), estimated taxes (\$22,000), and maintenance (\$36,300). The use basis of computation was employed by assumption that the involved traffic would be a small percent of the total moved over that line and that a trackage arrangement similar to that used by SP in a Beaumont, Tex., arrangement would be applicable. An estimated round trip time of 205 minutes expanded 33 percent for non-productive time and expanded and contracted for varying numbers of loads at \$0.6755 average engine cost per minute was used in calculating the switching costs in this part of the study. The third part of the study, based upon the other two parts, reveals that for one carload round trip, if handled directly by SP, would result in an estimated annual net loss to SP of \$44,600 and savings of \$13,100 for 5 carloads, \$85,200 for 10 carloads, \$157,400 for 15 carloads, and \$228,800 for 20 carloads, with a breaking point of 4.09 carloads a round trip.

UP presented similar cost study evidence which differed in three material respects, (1) the use of trackage cost based upon a numerical basis (described by UP as "user basis"),

3. In *Missouri—K.—T. R. Co. v. Kansas City Terminal Co.*, 198 I.C.C. 4 at page 9, the Commission, Division 3, in its report states in part: Both petitioner and respondent conceded that just and reasonable compensation must include a reasonable return

that is, adjusted in relation to the number of users regardless of individual use, (2) use of the actual tax value (\$122,000) on the involved property and maintenance, both computed on a "use" basis, and (3) use of a projection of the Portland Switching Study costs expected to be implemented during 1968. With these modifications, the UP study reveals (1) restated estimate of variable costs to SP by UP and SP&S handling of traffic between SP and Peninsula of \$15.87 a carload weighted average (35 UP cars and 7 SP&S cars), (2) a restatement of estimated variable costs to SP for handling its own traffic from and to Peninsula for 1 carload round trip as \$531.08, 5 carloads \$109.55, 10 carloads \$56.89, 15 carloads \$39.30 and 20 carloads \$30.63, and (3) a restated estimated annual net effect on SP resulting from its direct handling of traffic to and from Peninsula instead of using UP or SP&S connections, reflecting losses of \$188,051 for 1 carload round trip, \$170,965 for 5 carloads, \$149,720 for 10 carloads, \$128,280 for 15 carloads, and \$107,740 for 20 carloads. Generally the studies of SP and UP differ substantially in their estimated annual net effects. In their preparation there was certain reliance upon estimates, at least one variation in the random sampling used, imponderables such as estimates and judgment factors used in calculations, and use of a 418 car frame (an unusually small number for most satisfactory results) from which a ten percent sampling was taken.

upon the fair value of those zones of the terminal which petitioner has acquired the right to use. Two methods of computing that return are urged upon us. Petitioner urges the user basis, by which is meant that the petitioner should pay upon basis of the relation which its use of the terminal bears to the use of all the using carriers. This has been averaging somewhere in the neighborhood of 5 percent. Respondent urges the numerical basis, that is, adjustment in relation to the number of users of the terminal regardless of the extent of the individual use by those lines. As there are 11 users, petitioner's proportion under this basis would be one twelfth.

SHIPPERS' EVIDENCE

Zellerbach, the second largest producer of paper and paper articles in the United States and also a producer of industrial chemicals, has its principal manufacturing and shipping facilities located in the Portland area. It also has paper mills at Camas, Wash., and Wauna and West Lind, Oreg. It ships in excess of 1,100 carloads of the described commodities each month from the Portland area to various points throughout the United States. *Zellerbach* has or expects to establish four facilities in the Portland area. One is a distribution complex, Water Way Terminal Company, served by the Portland Terminal Company and Western Transportation. The latter is a certified water carrier owned by *Zellerbach* which has connections with a number of other carriers. At the time of hearing, Water Way Terminal Company facilities were being expanded and *Zellerbach* was negotiating for the purchase of a 1,500 water-front property located adjacent to Ashgrove Lime Company at the western end of Rivergate. The second is a pole yard located on 40 acres of land owned by *Zellerbach* at the eastern end of Rivergate. The pole yard, as noted, is served by Peninsula. The third facility is the planned construction of a 200,000 square-foot warehouse to be located on 44 acres of land purchased from Swift & Co. At the time of hearing the land purchase was waiting escrow clearance. The land is about 500 yards east of the SP&S main line at North Portland. The warehouse is expected to be used for the storing and distribution of products of the adjacent *Zellerbach* Flexible Packaging Division plant, the fourth facility.

During the 12 months ending November 30, 1967, 365 freight cars moved to or from the Flexible Packaging Divi-

sion plant and 638 freight cars (177 shipments) to and from the pole yard. The shipper's poles now move in 65-foot drop-end gondola cars supplied by the rail carriers. Sixty-four percent of the 177 pole shipments involved delays due to Zellerbach's inability to obtain suitable cars when needed. The delays ranged from 1 to 26 days, or an average of 4.5 days each.

Zellerbach supports each of the applications and petitions because authorization of the proposals would increase the number of carriers having direct access to Peninsula and increase its ability to obtain suitable cars, and because it desires service at its Rivergate facilities comparable to other transportation at Portland. It represents that such access could result in the elimination of a 22 degree curve in the present Peninsula tracks so that 85-foot pole cars can be accommodated thereon. Zellerbach represents that if SP had direct access to its pole yard, it would request that carrier's service more often. The Zellerbach representative could recall no instances in which it paid separate switching charges for service to and from its facilities located on Peninsula. Zellerbach indicates that the greater the number of connecting carriers required for handling a shipment the greater the number of rate divisions and cost of service.

Oregon Steel Mills, a division of Gilmore Steel Corporation of San Francisco, within the past 2 years has acquired 152 acres of Rivergate land where it is presently erecting a new steel plate mill. Several phases of construction of the mill are contemplated. The first phase cost is \$35 million. Upon completion of the first phase mill, it will produce 200,000 tons of steel plate annually and upon completion of the entire mill the ultimate mill's capacity will be 700,000 tons. The mill site was located at Rivergate because it

affords room for the mill's expansion and for the location of related steel fabricating industries near it and because Rivergate is considered by this shipper as a transportation hub. There are presently steel plate mills located at Provo, Utah, and Fontana, Calif. The Rivergate mill will be the first producing steel plate mill located in the Pacific Northwest and its location will result in the establishment of a steel basing point at Portland, whereas up to this time the steel basing points have been at Provo and Fontana. Ore for use at the mill presently will be provided by Marconi Company transported by water carrier from Peru to Rivergate. However, Gilmore Steel Corporation owns large iron ore deposits near Mount Shasta, Calif., near a line of the SP. Arrangements are in progress for procuring iron ore at the Shasta location. Oregon Steel Mills expects to ship unit trains of ore from Shasta to the Rivergate mill and has obtained assistance and information respecting proposed transportation costs from SP, which in turn procured proposed costs of switching at Portland from UP. SP, prior to the filing of its applications, proposed to transport the shipper's ore from Shasta to the UP Portland interchange in SP equipment, including all terminal service charges at Shasta at \$3.85 a gross ton subject to a tariff docketing proposal, and information received from SP respecting the proposed UP switching costs which was confirmed through the UP rate department was \$.23 a gross ton from the UP-SP interchange at Portland to Rivergate. Oregon Steel Mills prefers a single train crew and through round trip unit train service. UP indicates it cannot provide this type of service at Portland because union contracts require the use of local power equipment and the payment of the Portland crew for a minimum work time. The shipper represents that it would start mining ore at Shasta as soon

as economically feasible; that its ore can move economically only in unit trains in the service of a single carrier with no connections and that it supports the SP applications to enable direct access to its Rivergate plant by SP through North Portland. The shipper is aware that major fill and track construction would be necessary before operation from Shasta through North Portland becomes possible. It indicates that Rivergate is being developed by use of public tax money and it believes direct access to Rivergate should be afforded through all rail carriers.

Williamette Wood Products, Inc., manufacturers stock for the manufacture of baby cribs at North Portland. Raw materials are shipped from Omak, Wash., to its plant by rail under an in-transit rate, where they are processed and shipped beyond. The shipper has used SP trailer-on-flatcar service for movements of its commodities beyond Portland to Los Angeles, Calif. Each week about one carload of the shipper's commodities are moved to or from North Portland. The shipper has relied upon service of SP&S, NP, GN, and UP and has no need for additional rail services or for additional terminal switching service at its plant. It supports the application of UP-SP&S and would like to have the continued service by the same railroad personnel at North Portland.

Morrison Oil Company operates a storage and packaging plant at North Portland and has relied principally upon SP&S for the provision of rail service to and from its plant. Each year it receives about 55 car loads of oil at the plant. It also receives cans and tires and antifreeze which move to the plant by truck. The antifreeze is shipped by water to Portland and moves locally by truck from St. Johns to Portland. This shipper's packaged products are shipped principally by truck and railroad from North Portland to points in Washington and Montana. Railroad shipments move from North Portland to the Butte-Missoula and Billings, Montana, area. This shipper supports the SP&S-UP

application because it believes that the acquisition will result in the continuance of present service which has been satisfactory and would assist it in developing additional business. However, the shipper admits that UP would not be particularly interested in its development of business at points in such states as Arizona, New Mexico, Texas, and Louisiana served by SP. The shipper was not aware that a shipment of its cans on October 10, 1967, from Ravenwood, Calif., routed SP-SP&S required 45 hours for movement from the SP interchange at Portland to Peninsula or that a shipment of cans on October 28, 1967, from Ravenwood, Calif., routed SP-UP to Peninsula required 37 hours for movement from the Portland UP connection to Peninsula.

Collier Carbon & Chemical Corporation, a Union Oil Company subsidiary, is constructing a new \$2 million distribution facility north of the Ashrover Lime Company plant on the western side of Rivergate. The plant, to be in operation by the Fall of 1968, expects to use the direct service of SP, among other rail carriers, for the movement of its products from Rivergate. Urea, used in the manufacture of resins and fertilizer and as a cattle feed ingredient, is to be shipped by water carriers to the facility and to be reshipped by rail, truck, and water carriers to its customers. It is particularly interested in obtaining SP service for movements to western Oregon points and supports the SP applications because direct SP service would provide it suitable transportation to western Oregon points within provision of reasonable transit time, car availability, and rates. It has no preference as to the carrier switching its traffic to a belt-line or terminal company.

Serendip Industrial Materials of Portland, Oreg., supports the SP&S-UP application. It receives annually about 60 car loads of stone material at North Portland. The stone

is distributed to builders and metal refiners in the Portland area. Most of it is moved by GN from points in Washington and Canada although stone is also expected to be received from points east of Portland which would move by UP. This shipper has little interest in SP service, but if it receives stone from points south of Portland served by SP it would desire direct SP service to North Portland.

POSITIONS OF LABOR ORGANIZATIONS

Three of the eight labor organizations appearing in opposition to the applications and petitions presented evidence. The *Brotherhood of Railway Clerks of Portland Terminal Company* representing 300 employees of the latter company, particularly opposes the SP request for bridge trackage rights. The railway clerks maintain that the real purpose of SP is to enable its trains to bypass Portland Terminal Company and effect and interchange with SP&S, NP, or GN at North Portland instead of at the Portland Terminal Depot; that if bridge rights are granted, switching by Portland Terminal Company would decrease substantially; and that authorization of SP's request would result in increased traffic congestion on the involved UP track segment. This railway clerks organization has no objection to the proposal if limited to the interchange of Peninsula traffic at North Portland. It does not consider 30 hours transit time for the movement of cars from Albina Yard to North Portland reasonable.

The *Switchmen's Union of North America* is particularly interested in the welfare of 158 Peninsula Terminal Company employees. It opposes any grant of the applications or petitions permitting SP and Milwaukee to use interchange track facilities of Peninsula. It desires the continued handling of interchange traffic by Peninsula Terminal Com-

pany between SP and NP, GN, and SP&S and seeks employment security for its members. It maintains that services at Rivergate and North Portland are adequate. Starting in 1964 SP has on several occasions sought union assent to a change in the Portland interchange point for through trains from Portland Depot to a point north thereof.

The *Brotherhood of Locomotive Engineers of Union Pacific Railroad* opposes all of the applications and petitions and maintains that any grant thereof would affect engineer operations in the Kenton-Albina-East Portland-Barnes area. It maintains that the loss of even 1.5 car movements daily between East Portland and North Portland would reduce engine employees at Albina Yard. It desires maintenance of the status quo and represents that UP can provide all the involved services needed. However, objection by this organization to the SP&S-UP application to acquire Peninsula was withdrawn on brief, with a continuing objection to the SP and Milwaukee proposals. In the event of a grant of the latter carrier's proposals, it desires adoption by the Commission of employee protective conditions similar to those incorporated in an agreement entered into by the Brotherhood of Locomotive Engineers and Great Northern, Pacific and Burlington Lines, Inc., filed in Finance Dockets Nos. 21478 and 21480, as set forth in Appendix A to its brief filed June 17, 1968.

INTERVENERS' EVIDENCE

The Port's position is that Rivergate's development requires services of all the involved line-haul rail, barge, and ocean vessel carriers serving Portland with service at competitive rates, and that all the rail applicants should be afforded equal operating access to Rivergate. It expresses

a need for fast reliable freight service at Rivergate through Peninsula provided on equal terms by all present and future railroads serving Portland which can be accomplished by joint ownership. The Port desires the services of all the railroads to facilitate mechanized rapid handling of liquid and dry bulk commodities, containerized commodities, and other general freight between Rivergate and points throughout the United States. It asserts that single-car switching to and from small industries with so-called one-car sidings has become obsolete. Such switching is uneconomical because of engine and crew costs, and obsolete because trucks can more effectively perform a small shipment service.

The Western District Class I railroads traffic increased 36.2 percent in the 9 years following 1958. The Port's transportation consultant estimates that by 1990 traffic of those railroads will double, if adequate rail facilities are provided, and that Portland would share in its growth. Adequate facilities would include the most efficient mechanically fitted freight handling terminal with low freight handling costs possible through greater movement of intermodal traffic. After Rivergate's development, The Port estimates that from 500 to 600 cars or an average of 20,000 tons daily will move to and from the district; that daily service will require one unit train, one semi-unit train, one semi-unit trailer-on-flatcar (TOFC), train, two industry trains, and two switching runs, and that the types of service would include provision for (1) bulk commodity unit trains (never uncoupled), (2) semi-unit train service for handling the less mechanized traffic to move in blocks of 40 to 150 cars, (3) TOFC service, and (4) miscellaneous and switching service. Rivergate is represented as affording opportunity for use of new technology in rail terminal service by use of unit and

semi-unit trains, and the elimination of lost car movement time usually incurred at terminals. UP and SP&S, as noted, are the only carriers presently having direct access to Rivergate through the eastern and western entrances. The Port indicates that unless the four applicant railroads are afforded equal access to Peninsula its owners would create unsatisfactory non-single-line switching conditions for the other lines; that unit train bulk traffic is impeded equally as much by switching delays as by traffic interchanges; that if Milwaukee traffic is switched by SP&S or UP before reaching Peninsula, Milwaukee's single-line efficiency to and from points in such States as Indiana and Iowa will be impaired; that if SP traffic is similarly switched, its single-line advantage to and from such points as Medford, Reno, Stockton, San Francisco, Fresno, Phoenix, El Paso, New Orleans, and Memphis will be limited. The Port represents that existing uncorrelated transfer of freight cars within the Portland switching District will not meet Rivergate's rail service needs; that uncoordinated switching operations at Portland result in a minimum 24-hour transfer time, and sometimes 3 or 4 days for operations across the switching district compared to a few hours required for cross-city truck movements. Peninsula assertedly will be useful to Rivergate only if it can handle unit trains of 100 cars or more which Peninsula's track facilities presently will not accommodate.

Economic and statistical evidence relating to Rivergate presented by The Port's Research and Planning Department reveals, among other things, the following: The Columbia-Willamette system is the second largest river improvement project in the United States. The Federal Government and The Port together up to December 31, 1967, expended \$120 million in improving the system. Ultimate public and private investment at Rivergate is ex-

pected to exceed \$500 million. The Research and Planning Department is responsible for obtaining the described D.M.-J.M. commercial engineering Rivergate survey, report, and recommendations. The Port's long experience in marketing and research and its recognition of current technological transportation changes influenced its support of joint ownership of Peninsula by all the line-haul railroads serving Portland. The value of water-borne imports and exports in the Portland Custom District increased 313 percent from 1954 to 1966 compared to increases during that time of 201 percent at Los Angeles, 128 percent at San Francisco, and 132 percent at Washington ports. The Portland oceanborne traffic increased from 8,535,686 short tons in 1955 to 10,489,989 tons in 1965 or 22.9 percent.

The Portland Commission of Public Docks, City of Portland, favors joint ownership and operation of Peninsula and direct access to Rivergate by all line-haul railroads serving Portland. It is particularly interested in the transportation cost to shippers for movements to and from Rivergate, and asserts that non-competitive transportation costs there would preclude consideration by industries of Rivergate as an industrial site. The Commission represents that establishment of a \$100 per car line-haul revenue minimum as proposed in the Conference of Railroad Presidents June 20, 1967, agreement to establish a single basis switching charge at competing Pacific Northwest points would adversely affect Rivergate shippers' interest without equal ownership by all the line-haul railroads in Peninsula. Railroads with no such interest for economic reasons would be required to assess switching charges, while owner-carriers subject to their own tariff provisions could absorb switching costs on the basis of a lower applicable car minimum revenue. Numerous illustrations of instances in which this

might occur are in evidence. For example, a non-owner carrier subject to the P.C.F.B. Tariff No. 35, I.C.C. 1098, Item 685, naming a rate on cans, fibreboard, set up, of 40.5 cents a hundredweight, 14,000 pound minimum weight, from Portland to Banks, Oreg., representing a minimum car revenue of \$84.70 would be required to assess an additional charge while an owner carrier would absorb such a charge. Also, pointed out is the second exception to the proposed switching agreement which provides that switching charges will not be absorbed in instances where excluded by specific tariff provision.

The Public Utility Commissioner of Oregon favors joint ownership of Peninsula by all line-haul carriers serving Portland. Evidence presented by the Commissioner covers geographical and physical characteristics of the involved transportation area. It reveals, among other things, that in addition to the five major railroads, NP, GN, SP&S, UP, and SP presently serving the Portland area, 275 motor carriers operate to, from, or within Portland. Fifty-one of these carriers are regular-route general commodity carriers all authorized to serve Rivergate within the Portland commercial zone. Tables in evidence presented by the Commissioner show that the annual operating revenue of Peninsula has ranged from a high of \$161,292 in 1956 to a low of \$75,949 in 1963. Its average revenue per car for switching service increased from \$7.93 in 1950 to \$27.71 in 1966. Peninsula's net operating income has ranged from \$39,253 in 1955 to a deficit of \$4,153 in 1962. While it operated at a deficit in 1962 and 1963 its income has since considerably improved. The Commissioner represents that the future need of Peninsula is closely related to development of Rivergate and the granting to SP and Milwaukee of direct access to Peninsula would provide present and future industries

served by Peninsula direct service by all line-haul railroads serving Portland.

Through rates and charges of SP&S, GN, NP, and UP are presently applicable to industries served by Peninsula. SP does not interchange traffic at Peninsula and depends upon SP&S or UP switching service between the SP interchange at Portland (Union Station) or East Portland and the North Portland interchange. SP presently absorbs the switching charges on traffic moved to or from Peninsula subject to a per-car minimum charge of \$67 plus increases. Peninsula industries pay UP or SP&S for switching between North Portland and East Portland when the published through rates do not provide for absorption of the switching charges. For example, a switching charge is applicable to noncompetitive traffic originated by SP in Oregon moving to Peninsula.

DISCUSSION AND CONCLUSIONS.

The issues here first require an understanding of the treatment to be afforded the involved Portland area, including land and transportation facilities of the public, of all types of carriers there, and of the shipping industries. Recognition of the public interest, the carriers' competitive efforts, and the present and future traffic pattern in the entire Portland area is required. They are directly related to the success or failure of trunk line operations there. Some indication exists that segmentized consideration would be appropriate. For example, considering the trackage between Albina Yard and North Portland as other than part of the UP Portland (Albina Yard) terminal facility. The factual reality evident points to an industrial transportation area which in the best public interest can be treated only as one transportation terminal entity. Ob-

viously, divisive determinations would result in multiple problems and prolonged litigation not conducive to the future welfare, growth, and development of the Portland area. Therefore, judgments here are necessarily based upon consideration of the involved area as a whole.

The lead applications and related petitions were filed pursuant to sections 5(2) or 3(5) of the Interstate Commerce Act. Under section 5(2)(b), approval of requests for control and ownership such as those involved here must be predicated upon conditions which would promote interstate transportation in the best public interest. In *N. Y. Central Securities Co. v. U. S.*, 287 U.S. 12, the Supreme Court stated, at page 25, that "the term 'public interest' **** has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provisions and best use of transportation facilities ****."

Section 5(2)(c) of the Act contains the essentials for the Commission's consideration before a proposal thereunder may be authorized. These are (1) the effect of the proposed transaction upon adequate transportation service to the public, (2) the effect upon the public interest of the inclusion, or failure to include other railroads in the territory involved in the proposed transaction, (3) the total fixed charges resulting from the proposed transportation, and (4) the interest of the carrier employees affected. Additionally, the public interest test is to be applied in light of the national transportation policy which includes the promotion of sound economic conditions and the development of a more efficient transportation system.

Section 5(2)(d) of the Act provides that:

The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involv-

ing a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved; upon petition by such railroad or railroads requesting such inclusion, and upon finding that such inclusion is consistent with the public interest.

Section 5(2)(f) of the Act provides that:

As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Section 5(11) of the Act specifically relieves the applicants in transactions approved under section 5(2)(a) from operation of the antitrust laws and of certain other restraints; limitation, and prohibitions of law. However, the Supreme Court in *Seaboard Air Line R. Co. v. U.S.*, 154, 156, indicates that section 5(11) does not authorize the Commission to ignore the antitrust laws, but must estimate the scope and appraise the effects of curtailed competition which will result from the proposed acquisition and consider the advantages of improved service and other matters in the public interest to determine whether the acquisition will assist in effectuating the overall transportation policy.

Section 3(5) of the Act provides in part:

If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including mainline track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced.

Also pertinent here is section 1(18) of the Act which provides in part:

After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line or railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present and future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit such abandonment.

The evidence justifies authorization of the proposed control in Finance Docket No. 24679 conditioned upon inclusion and equal ownership by SP and Milwaukee and the intervening trackage access to Peninsula by the latter two carriers, as set forth in the findings, and the conclusion that such control is in the public interest and would promote a sound transportation system. The Port, Public Utility Commissioner of Oregon, Portland Commission of Public Docks, and some industry representatives which presented evidence support joint equal ownership by all the line-haul railroads serving Portland. Existing disparity in charges and treatment of traffic within the Portland switching area is convincing evidence that the greatest economic advantage for equality of shippers and carriers can be accomplished

best by equal access and ownership. The most economical and functionally modern transportation facilities are essential to development of Rivergate and the Port of Portland. Limitation of direct access there to two railroads barring on-line solicitation and the direct development interests of the other railroads serving the Portland area is contrary to an environment of unencumbered development and the establishment of a sound transportation system. Each of the four railroads which request equal ownership in Peninsula are class I railroads with ample financial means for ownership participation and the sharing of cost for future betterments. Moreover, direct access to all the carriers will enable shippers to deal directly with originating carriers providing on-line service to many points in areas not served by the two initial applicants. Shippers would benefit from elimination of switching charges assessed on non-competitive traffic where one of the applicants now acts as a switching carrier.

No particular finding or further consideration here respecting fixed charges is required, except to say that evidence relating to the proposals reflects no increases in, or guarantee, or assumption of fixed charges which would require statutory action.

With respect to protection of employees' interests, authorization of the control proposals no doubt would result in some employee readjustments. However, the evident immediate effects of the proposals upon employees are minimal, and normal attrition would tend to dissipate them. At most, the immediate result would involve reassignment of switching crews for about 1.5 cars daily moving through Albina Yard, because responsibility for the move under the proposals would shift from UP to SP. One labor organization represents, in absence of documentary or statistical

support, that a change in the interchange point, of through traffic, from East Portland to North Portland would reduce operation of the Portland Terminal Company by as much as 50 percent. Actually, whether traffic moves through Albina Yard or through the Portland Terminal Company Yard in route to or from North Portland is by railroad management prerogative exercisable through carrier agreement irrespective of a determination here. Even though the effects are minimal, employees of the involved railroads, nevertheless, will be affected by authorization of the proposals, and action here is subject to, at least, the bare requirements of section 5(2). As noted, certain carrier-employee labor agreements of the involved railroads exist, but participants in these proceedings espouse no new agreements wherein conditions have been prescribed or agreed upon by the parties as permitted by the last sentence in section 5(2)(f). However, the Brotherhood of Locomotive Engineers, on brief, request the imposition of conditions similar to those contained in an agreement dated June 25, 1965, signed by it, and The Great Northern Pacific & Burlington Lines, Inc., used as a basis for prescribing protective conditions in the *Great Northern Pac.—Merger—Great Northern, supra*, proceedings. Aside from the prescription of bare minimum protective conditions in this proceeding as imposed in *Chicago & N. W. Ry. Co. Merger*, 261 I.C.C. 672 at 675, more detailed conditions are deemed unnecessary and are not recommended. Actually, the evidence affords assurance of increases in involved traffic movements, if ample transportation is provided, which would result in substantial overall public and employment benefits.

Evidence relating to the SP applications, Finance Docket Nos. 24890 and 24891, warrants a conclusion that common use by SP of the terminal facilities, including trackage, of

UP between Peninsula, at North Portland Interchange tracks, and the SP-UP connection at East Portland is in the public interest, practicable, and would not substantially impair UP's ability to handle its own business. The issue affording the greatest contest here is whether traffic conditions over and along UP trackage between East Portland and North Portland warrant the proposed SP operation. The record reflects substantial traffic movements over the UP trackage with congestion over the single track from St. John's Tunnel and in and around Peninsula Junction. Noted, is the almost incredible 30-hour average transit time required for car movements between Albina Yard and Peninsula, a round trip distance of about 10.4 miles, including engine changes, car inspection, and car classification at Albina Yard, which UP considers reasonable. Despite the congestion, there are times during each day when the single-line track through the tunnel to North Portland is clear and could accommodate additional traffic. UP asserts it is capable of providing the public, all the service it needs presently, or will require, in the involved area. With no immediate appreciable increase in the involved traffic, the examiner is convinced that a grant to SP of the trackage rights would result in no significant increase in congestion on the involved UP track segment, and the user carriers through their joint efforts would be in a better position to overcome future traffic impediments as they occur. Actually, with SP cars being classified and inspected at Brooklyn Yard or Eugene, before movement by SP under the proposal directly through Albina Yard to North Portland and return in about 3.5 hours, no more and possibly less congestion should occur than at present. While UP has endeavored to relieve congestion in the Albina Yard area through various devices, the 30-hour transit time

remains unsatisfactory, and greater efforts in the public interest must be found to expedite movements between those points. With the development of Rivergate and the requirements for substantial movements of traffic, including unit trains, to and from that area the examiner is convinced that access thereto by other line-haul carriers will create greater incentive for improvement of railroad facilities and for elimination of present unsatisfactory conditions in the involved area. Rather than perpetuate the existing unsatisfactory conditions, the advent of other carriers, the advent of other carriers would at least supply added carrier financial support and responsibility greatly favoring the public interest.

As noted, cost studies of both SP and UP introduced in evidence reflect great variance in the net effect of operations over the Albina-North Portland track segment involved here. The studies are significant only to the extent that they bear on the issue of public interest, and to the extent that they may affect compensation which might be paid UP for use of its involved trackage. The probative effect of the studies upon public interest is questionable because of variables in judgment and calculations used, or which might be used, in their preparation. Of interest, is the study basis of SP for determining compensation for use, that is, the relation which actual trackage use bears to total use by all users, compared to the basis used in the UP study, generally the payment in relation to the number of users irrespective of extent of use by any of the carriers. In this connection, the examiner observes that while the application in Finance Docket No. 24890, in part, contains a request for "bridge trackage rights" the application in Finance Docket No. 24891 specifies no particular type of trackage rights sought. In the best public interest any

authorization of proposed trackage rights should permit full user rights, with the attending assumption by the recipient thereof of entire use and responsibility and the payment of compensation therefor on a numerical basis. However, the amount of compensation for use of trackage rights recommended herein, is left to agreement by the involved carriers. Section 3(5) clearly reveals that after the right of a petitioner to use the terminal facilities of another carrier has been determined, the interested carriers shall have an opportunity to agree upon the terms and compensation for such use. In event of failure of the carriers to agree, they may petition the Commission to reopen the proceeding for further hearing for determination and prescription of terms and compensation. Jurisdiction will be retained for such purpose. See *Missouri - K. - T. - Ry. Co. v. Kansas City Terminal Co.*, *supra* and *Use of Erie of Niagara Junction Ry. Co. Terminals*, 269 I.C.C. 493, 499.

Authorization of joint ownership and access by the four line-haul railroads in Peninsula, and the proposed trackage rights to SP would not curtail competition. To the contrary, shippers in the involved area would be afforded free direct access to all the line-haul carriers' services. Among other things, it would place traffic movements between the Portland area, on the one hand, and, on the other, on-line points of carriers in California and States east thereof, on a more competitive basis with movements between those points over the lines of UP and GN and their connections, through Wishram, Wash., Bend and Chemult, Oreg., and Bieber and Sacramento, Calif. Also, Milwaukee would become more competitive with UP and GN and their connections in providing service to the north and east of Portland. The authorizations, generally, would result in improved competitive service and the fostering of sound transportation in the involved area.

UP asserts on brief that extension of service by SP and Milwaukee as requested cannot be approved under section 3(5) or section 5(2) because the service each seeks to perform requires a finding that the present and future public convenience and necessity require extensions of their operations into the involved territory pursuant to section 1(18) of the Act. SP is certificated to operate from points south of Portland to East Portland, within the Portland Switching District, from which it serves, and has served, Portland through connections for many years. The Commission has ample power under section 3(5) to require use by SP of the involved UP terminal facilities and use of Peninsula facilities. However, the Commission has authority under section 5(2) upon petition by a carrier as prerequisite to approval of a proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved. This section contains authority for the inclusion of SP upon equal terms in the Peninsula purchase, for SP is a railroad "in the territory" providing service in the Portland area. Further certification of SP under section 1(18), aside from possible authorization of user rights under section 3(5), to operate to and from Peninsula, in the circumstances, is not required. The powers conferred by sections 3(5) and 5(2), collectively, provide ample authorization to permit that transportation which in the Commission's judgment, is best suited to public needs. As noted, Milwaukee's request for inclusion as an equal owner in Peninsula and the right of access thereto depends upon termination of litigation and consummation of the merger authorized by the Commission in *Great Northern Pac.—Merger—Great Northern, supra*, wherein Milwaukee, as pertinent, was granted trackage rights between Longview Junction and Portland, a distance of about 46 miles.

After consummation, Milwaukee will acquire trackage rights to enable operations between Longview Junction and Portland over the main line tracks of SP&S and SP including connection with the North Portland interchange tracks. Authority of the Commission in the granting of such trackage rights to Milwaukee in order to preserve the competitive conditions in the involved territory is not questioned. Whether such grant is sufficient to create another railroad in the Portland area within the meaning of section 5(2) without the further procuring of a certificate under section 1(18) is subject to question, for the Longview-Portland track is not part of a terminal facility and the trackage rights over this track segment actually create no certificated authority. However, the evidence adduced in the *Great Northern Pac.—Merger—Great Northern* case affords ample justification for issuance of such a certificate without further hearing, upon petition therefore. In view of the pendency of the described case, the examiner recommends authorization of control on an equal ownership basis by SP&S, UP, and SP on Peninsula with access thereto, subject to sale (upon consummation of the merger in the *Great Northern Pac.—Merger—Great Northern* proceeding) by those three carriers to Milwaukee of a one-fourth equal interest in Peninsula, including access trackage rights thereto. In event the parties elect not to consummate the purchase recommended herein further petitions by these carriers requesting access to and operation over trackage of Peninsula pursuant to section 3(5) of the Act may be filed. Jurisdiction will be retained for that purpose.

ULTIMATE FINDINGS AND ORDERS

In Finance Docket No. 24679 and in the related petitions dated August 23 and November 29, 1967, upon consideration

of all evidence of record, the examiner finds (1) that control of Peninsula Terminal Company by Spokane, Portland & Seattle Railway Company and Union Pacific Railroad Company, and the inclusion of Southern Pacific Company in such control, through purchase of all outstanding stock of Peninsula Terminal Company in equal shares and the additional equal contribution by each for payment of an unsecured \$70,000 locomotive equipment open account owed by Peninsula Terminal Company to Union Stockyard Corporation, subject to sale by each, Spokane, Portland & Seattle Railway Company, Union Pacific Railroad Company, and Southern Pacific Company, of a one-twelfth interest in Peninsula Terminal Company, including pro rate contribution for the locomotive equipment, to Chicago, Milwaukee, St. Paul and Pacific Railroad Company, conditioned (a) upon consummation of the merger transaction in the *Great Northern Pac.—Merger—Great Northern proceeding*, 331 I.C.C. 869, and (b) upon the filing by Chicago, St. Paul and Pacific Railroad Company of a request for certificate of convenience and necessity authorizing railroad operation between Longview Junction, Wash., and Portland, Oreg., upon the terms and conditions set forth herein, are just and reasonable, constituting a transaction within the scope of section 5(2)(a) of the Interstate Commerce Act, and will be consistent with the public interest, and (2) that the right of access by Southern Pacific Company and Chicago, St. Paul & Pacific Railroad Company, upon consummation of the transaction described in (1) above by one or both of these carriers, to Peninsula Terminal Company trackage over intervening North Portland interchange tracks, at North Portland, Oreg., presently owned individually or jointly by Peninsula Terminal Company, Spokane, Portland & Seattle Railway Company,

Union Pacific Railroad Company, and Northern Pacific Railway Company, upon such terms and compensation for use of such intervening trackage mutually agreeable to the interested carriers, or in the event of failure to agree, as the Commission may fix as just and reasonable, to be ascertained in accordance with the provisions of section 3(5) of the Interstate Commerce Act, such compensation to be paid or adequately secured before enjoyment of use thereof may be commenced, would be in the public interest, that operation pursuant to such right of access is practicable and would not substantially impair the ability of the owning carriers to handle their business; and that the application and petitions in all other respects should be denied.

In Finance Dockets No. 24890 and No. 24891, the examiner finds that common use by Southern Pacific Company of the railroad tracks and facilities of Union Pacific Railroad Company for operation between the Union Pacific Railroad Company-Southern Pacific Company track connection at East Portland, Oreg., and tracks of Peninsula Terminal Company at North Portland, Oreg., through Albina Yard, and Peninsula Junction, conditioned upon such terms and such compensation as Union Pacific Railroad Company and Southern Pacific Company may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable, to be ascertained in accordance with the provisions of section 3(5) of the Interstate Commerce Act, such compensation to be paid or adequately secured before the enjoyment of use thereof may be commenced, would be in the public interest; that such operation is practicable and would not substantially impair the ability of Union Pacific Railroad Company to handle its business, and that the applications in all other respects should be denied.

In each of the proceedings the examiner further finds as a condition to the transactions authorized therein, that

during the period of 4 years from the effective date of the orders herein such transactions will not result in employees of the carrier or carriers by railroad affected by such orders being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this section shall not be required to continue for a longer period, following the effective date of such orders, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order.

ORDER

Premises considered, it is the ORDER of the hearing examiner in Finance Docket No. 24679, Spokane, Portland & Seattle Railway Company and Union Pacific Railroad Company—Control—Peninsula Terminal Company, in the petition of Chicago, Milwaukee, St. Paul & Pacific Railroad Company filed August 23, 1967, and in the amended petition of Southern Pacific Company, filed November 29, 1967, that:

Acquisition of an equal interest by each, Spokane, Portland & Seattle Railway Company and Union Pacific Railroad Company, and the inclusion therein of Southern Pacific Company, of control of Peninsula Terminal Company, through purchase of the outstanding stock, and the sale by each of a one-twelfth interest in Peninsula Terminal Company to Chicago, St. Paul & Pacific Railroad Company, upon; and in event of, subsequent conditions be, and it is hereby, approved and authorized, subject to conditions set forth in the findings, and the application and petitions in all other respects are hereby, denied.

The authority to control, approved herein, may be exercised by Spokane, Portland & Seattle Railway Company, Union Pacific Railroad Company, and Southern Pacific

independently of Chicago, St. Paul & Pacific Railroad Company, and if exercised, the first three named carriers shall submit for consideration and approval of this Commission three copies of the journal entries required to record the transaction.

In event subsequent conditions as set forth in the findings permit exercise of the authority herein, and such authority is exercised, by Chicago, St. Paul & Pacific Railroad Company, this carrier shall submit for consideration and approval of this Commission three copies of the journal entries required to record the transaction.

The right of access by one or both of Southern Pacific Company and Chicago, St. Paul & Pacific Railroad Company, upon consummation of the transaction described immediately above, to Peninsula Terminal Company over intervening North Portland interchange tracks of Peninsula Terminal Company, Spokane, Portland & Seattle Railway Company, Union Pacific Railroad Company, and Northern Pacific Railway Company as described in the findings herein, be, and it is hereby, approved and authorized subject to the conditions set forth in the findings and orders.

Within 90 days from the effective date of this order, Southern Pacific Railroad Company, Peninsula Terminal Company, Spokane, Portland & Seattle Railway Company, and Northern Pacific Railway Company shall submit for consideration and approval of the Commission a joint agreement containing the terms and compensation covering the use of North Portland interchange trackage, with provisions for possible inclusion of Chicago, St. Paul & Pacific Railroad Company in such agreement within 1 year from the effective date of this order, and in event such agreement for any reason cannot be reached, a petition may be filed requesting the Commission to determine such just and reasonable terms and compensation.

Northern Pacific Railway Company, one of the owners of Spokane, Portland & Seattle Railway Company, be, and it is hereby declared to be a party to these proceedings for the purpose of participation in trackage agreements described in this order.

The authority herein granted shall not be exercised prior to the date of service of a notice or order stating that this recommended order has become the order of the Commission.

Unless the authority herein granted is exercised within 1 year from the date of such notice or order, or within any extension thereafter ordered by the Commission, this order shall be of no further force and effect.

The jurisdiction of this Commission in these proceedings be, and it is hereby, expressly retained for a period of 2 years from the date of the effectiveness hereof for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate.

The recital of balance sheet and other financial data shall not be construed as approval of accounting methods which have been followed, or expenditures represented thereby.

By the Commission, Samuel C. Shoup, Hearing Examiner.

Dated at Washington, D. C., this 9th day of September, A. D. 1968.

(SEAL)

H. NEIL GARSON,

Secretary

ORDER

Premises considered, it is the ORDER of the hearing examiner in Finance Docket No. 24890, Southern Pacific Co.—Common Use of Terminal Facilities—Peninsula Ter-

terminal Co., and in Finance Docket No. 24891, Common Use of Certain Terminal Facilities—Union Pacific Co., that the request therein for common use by Southern Pacific Company of the railroad tracks and facilities of Union Pacific Railroad Company as described in the findings herein, be, and it is hereby, approved and authorized subject to the conditions set forth in the findings and order herein; and that the applications in all other respects are denied.

Within 90 days from the effective date of this order the Union Pacific Railroad Company and the Southern Pacific Company shall submit for consideration and approval of the Commission a joint agreement containing the terms and compensation covering the use of tracks and terminal facilities herein authorized; and in event such agreement for any reason cannot be reached, a petition may be filed requesting the Commission to determine such just and reasonable terms and compensation.

The authority herein granted shall not be exercised prior to the date of service of the order adopting this recommendation as the order of the Commission, or of a notice stating that this recommended order has become the order of the Commission.

The jurisdiction of this Commission in these proceedings be, and it is hereby, expressly retained for a period of 2 years from the date of the effectiveness hereof for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate.

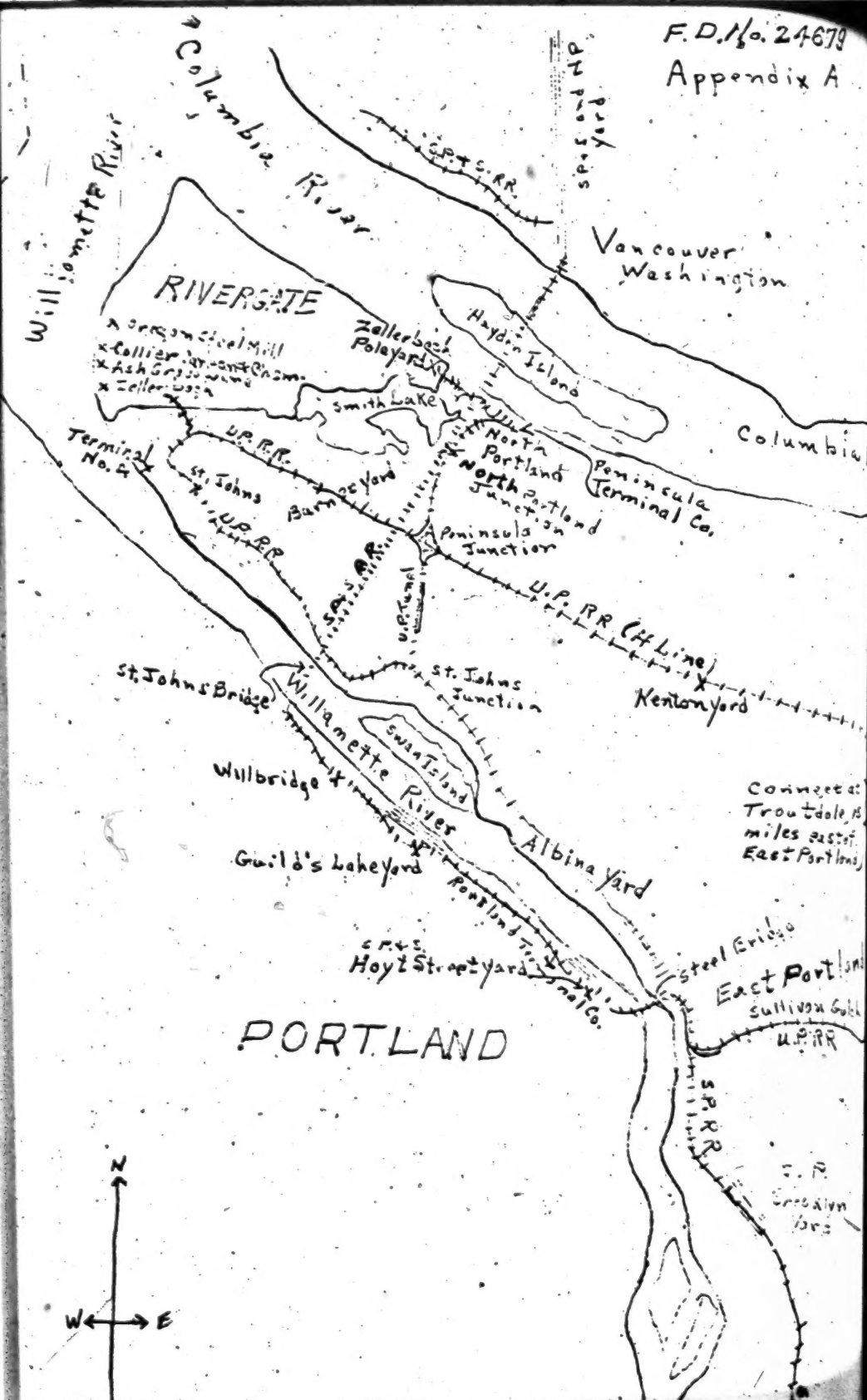
By the Commission, Samuel C. Shoup, Hearing Examiner.

Dated at Washington, D. C., this 9th day of September, A. D. 1968.

(SEAL)

H. NEIL GARSON,

Secretary



Appendix F

Endorsed:

Filed Sept. 1, 1970

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By M. Hartzell

Deputy

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In The United States District Court

For the District of Oregon

Civil Action No. 69-696

Port of Portland, Sam R. Haley, Public
Utility Commissioner of Oregon, Com-
mission of Public Docks of the City of
Portland, Oregon

Plaintiffs,

v.

The United States of America and Inter-
state Commerce Commission,

Defendants.

**NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES**

Notice is hereby given that the Port of Portland, Sam R. Haley, Public Utility Commissioner of Oregon, Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Southern Pacific Transportation Company, plaintiffs, hereby appeal to the Supreme Court of the United States from the order and judgment dismissing the complaint, entered in this action of July 9, 1970.

This appeal is taken pursuant to 28 U.S.C. § 1253.

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By W. Harney Wilson

CERTIFICATE OF SERVICE

I, W. HARNEY WILSON, the attorney for plaintiff Southern Pacific Transportation Company, hereby certify that on this first day of September 1970, I served a true copy of the foregoing Notice of Appeal to the Supreme Court of the United States by mailing the same in an envelope duly addressed with airmail postage prepaid to the following:

Solicitor General

Department of Justice

Washington, D.C. 20530

Interstate Commerce Commission

Washington, D.C. 20423

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F-4

Appendix

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Appendix G

National Transportation Policy

[49 U.S.C., preceding §§ 1, 301, 901, and 1001].

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * * *

§ 3, par. 5. Terminal facilities; use of and compensation for. If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier

or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

• • • • •

§ 5, par. (2). Unifications, mergers, and acquisitions of control. (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a

carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad

subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others:

(1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

• • • • •

§ 5, par. (11). - Plenary nature of authority under section. The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent,

in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.